118-211

RETURN TO RULE.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1883.

No. ~~856.~~ 214

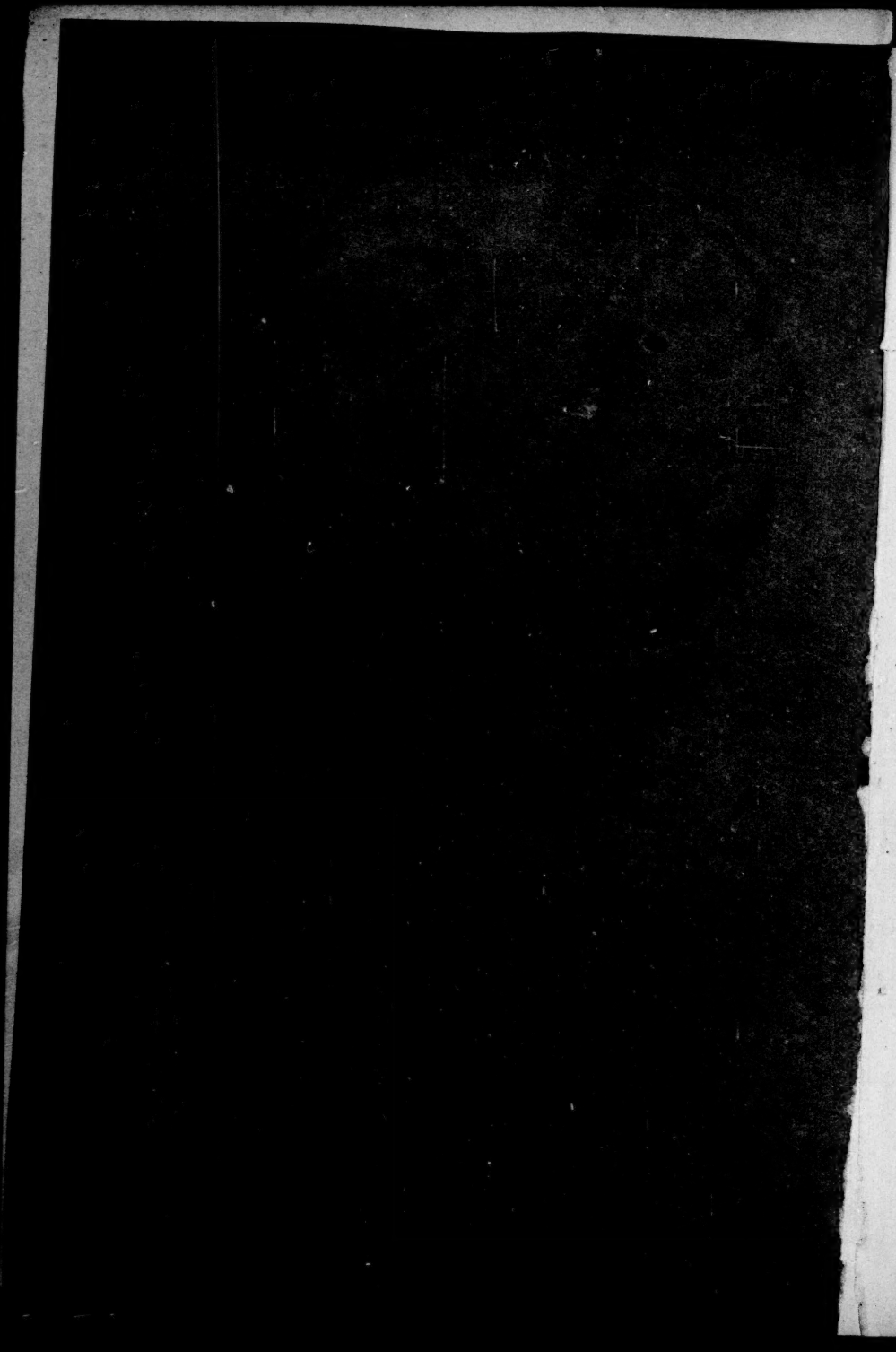
GARRETT B. HUNT & JACOB ESCHELMAN, APPELLANTS,

vs.

DAVID D. OLIVER.

RETURN TO RULE TO SHOW CAUSE WHY SUPERSEDEAS SHOULD NOT ISSUE.

FILED OCTOBER 9, 1883.



1 Supreme Court of the United States.

DAVID D. OLIVER, COMPLAINANT,
vs.
GARRETT B. HUNT AND JACOB ESCHELMAN, impleaded with Henry S. Cunningham, Calvin Haines, Philip M. Ranney, George J. Robinson & Henry M. Robinson, defendants.

The circuit court of the United States for the eastern district of Michigan, in obedience to an order from the said Supreme Court directing it to show cause why a writ of supercedeas should not issue in accordance with the prayer of Garrett B. Hunt as set forth in his petition to said Supreme Court, certifies and says:

1. That this court, after considering the pleadings and proofs, and the arguments of counsel in said cause on the 19' day of April, made and entered an interlocutory order and decree and order of reference, a copy of which is attached hereto marked "Interlocutory decree."

2. That after due proceedings had on said order of reference, and the report of the referee to this court, this court on the 21st day of September, 1882, made a final order and decree, a copy of which is hereto attached marked "Exhibit Final Decree."

2 3. That thereafter the said defendants, Garrett B. Hunt and Jacob Eschelman, claimed an appeal separate from their codefendants, and proceeded to perfect their appeal within the sixty days provided as a limit for the filing of a bond which shall act as a stay of execution.

4th. That thereafter, and on the 8th day of January, 1883, said David D. Oliver applied to this court for a writ of assistance to put him in possession of all lands in controversy in said cause not affected by the appeal taken by defendants, Hunt and Eschelman.

5. That in opposition to said motion several affidavits were filed, and reliance was had on title claimed to have been derived through the foreclosure of a certain mortgage contained in and forming part of the records of the case culminating in the final decree before mentioned.

6. That copies of the papers filed by the parties in support of and in opposition to said motion are hereto attached, marked:

"1. Motion for writ." "2. Affidavit in support of motion." "3. Affidavit of Wm. Muir in opposition to motion." "4. Affidavit of Wm. H. San'born in opposition to motion." "5. Affidavit of Dugald McArthur in opposition to motion." "6. Affidavit of Henry S. Cunningham in opposition to motion." "7. Affidavit of Garret B. Hunt in opposition

3 to motion." "8. Affidavit of Lee R. Sanborn in opposition to motion."

Also there is attached and marked "Copy of mortgage," referred to in said proceedings, the original of which is found as an exhibit in the cause.

7. After considering said application, and the affidavits in opposition thereto, and the records and proofs in the cause, the court, on the 9th day of April, 1883, made an order, a copy of which is attached hereto, directing a writ of assistance to issue, substantially in accordance with the said motion of complainant.

8. That from said order said Lee R. Sanborn asked leave to appeal, and this court refused to allow an appeal, for the reason that said Lee R. Sanborn was not a party to said cause; but the said Garret B. Hunt has hitherto made no attempt to appeal from said order, nor has he taken any proceedings or filed any papers in this court in said cause since the entry of said order on the 9th day of April, 1883. The opinion of this court, delivered by Judge Withey, is also attached hereto.

HENRY B. BROWN,
District Judge.

4 EXHIBIT COPY OF MORTGAGE.

This indenture, made the seventeenth day of November, in the year of our Lord eighteen hundred and sixty-six, between David D. Oliver, of the town of Alpena, county of Alpena, and State of Michigan, and Sarah Ann, his wife, parties of the first part, and Garret B. Hunt, Henry S. Cunningham, and Jacob Eschelman, of the town of Clarence, county of Erie, and State of New York, of the second part, witnesseth:

That said party of the first part, for and in consideration of the sum of thirty-five hundred dollars, lawful money of the United States of America, to them in hand paid by said party of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, released, enfeoffed, and confirmed, and by these presents do grant, bargain, sell, release, enfeoff, and confirm unto the said second party, and to their heirs and assigns forever, all those tracts or lots of land lying in the county of Alpena and State of Michigan and particularly described according to Government survey thereof as follows, to wit:

* * * * * * *

5, 6, 7 Also in Township 29 North, Range 8 East, the South fractional half of Section 12, containing two hundred and twenty-seven and $\frac{5}{100}$ acres, more or less, with the saw-mill and other improvements thereon.

* * * * * * *

8 This mortgage being given to secure the purchase-money of the 6,080 acres first-above described, to have and to hold the above bargained premises to said party of the second part, their heirs and assigns, to the sole and only proper use, benefit, and behoof of the said party of the second part, their heirs and assigns forever.

Provided always, and these presents are upon the express condition, that if said David D. Oliver, his heirs, executors, or administrators, shall and do well and truly pay or cause to be paid to the said party of the second part, their heirs, executors, administrators, or assigns, the just and full sum of $35,000, in manner following, viz: $5,000 thereof July 1st, 1867; $10,000 thereof October 1st, 1867; $5,000 thereof July 1st, 1868; $5,000 thereof October 1st, 1868; $5,000 thereof July 1st, 1869, and $5,000 thereof October 1st, 1869, with annual interest, interest on the whole sum from time to time unpaid to be paid on the first day of October in each and every year, and with the privilege of paying said principal sums at any time sooner, in sums of not less than $1,500 at the time, according to the condition of a certain bond or 'right'ing obligatory, bearing even date herewith, executed by the said party of the first part to said party of the second part, then these presents and

9, 10

the said bond or writing obligatory shall cease and be null and void; but in case of the non-payment of the said sum of $35,000, or of the interest thereof, or any part thereof, at the above time limited for the payment thereof, or as provided in said bonds, then and in said case it shall and may be lawful for said party of the second part, their heirs, executors, administrators, or assigns, and the said party of the first part do hereby empower and authorize the said party of the second part, their heirs, executors, administrators, or assigns, to grant, bargain, sell, release, and convey the said premises, or any part thereof, and the appurtenances, at public auction or vendu', and on such sale to make and execute to the purchaser or purchasers, his or their heirs and assigns forever good, ample, and sufficient deed or deeds of conveyance in the law pursuant to the statute in that case made and provided, rendering the surplus money, if any there shall be, to said party of the first part, their heirs, executors, or administrators, after deducting the principal and interest moneys due as aforesaid, and the costs and charges of such vendu' and sale as aforesaid.

In witness whereof the said party of the first part have hereunto set their hands and seals the day and year first-above mentioned.

(Sig.) DAVID D. OLIVER.
SARAH A. OLIVER.

Signed, sealed, and delivered in presence of—
G. V. MELVILLE.
G. W. HAWKIN.

* * * * * * *

11 *Interlocutory decree.*

DAVID D. OLIVER, COMPLAINANT,
vs.
HENRY S. CUNNINGHAM, GARRET B. HUNT, Jacob Eschleman, Calvin Haines, Phillip N. Ranney, George J. Robinson, and Henry N. Robinson, defendants.

The motion of defendants Cunningham, Hunt, Eschelman, Haines, and Ranney for a rehearing of this cal*l* came on to be heard May 27th, 1880, and was argued by counsel, and thereupon, upon consideration thereof, it was by the court found and determined that the interlocutory decree made and entered in this cause March 8th, 1880, be, and the same is hereby, modified as follows: First, the court finds that in the summer of 1868 the complainant, David D. Oliver, owned and was possessed of the lands and property hereinafter described situate in said district, and being involved in difficulties with his partner, George J. Robinson, relative to the control of the mill and lumbering business in which the two were then engaged; that at this time complainant was indebted to various persons, and that most of his indebtedness was secured by mortgages on real estate hereinafter described, and consisting of the following items: A
12 mortgage to the defendant' Henry S. Cunningham, Garret B. Hunt, and Jacob Eschelman, to secure $35,000; a mortgage to defendant' Calvin Haines and Phillip N. Ranney to secure $16,000; a mortgage to the firm of E. and G. R. Haines securing $10,000; a mortgage to

James Hill to secure $3,000, and a mortgage to James B. Wain to secure $10,000; an amount due on land contract with David Preston, $12,000; an unsecured or floating indebtedness, $6,000; an unsecured or floating indebtedness against the firm of Oliver and Robinson, $25,000; and the court finds his total indebtedness to have been $117,000.

2. That complainant applied to Cunningham and Hunt on behalf of the first mortgagees aforesaid to assist him in extricating himself from the difficulties in which he had become involved.

3. That defendant Cunningham, without receiving any consideration therefor, made an assignment of his interest in said $35,000 mortgage to his comortgagees, Hunt and Eschelman, and immediately afterwards, while concealing the fact of this assignment and without paying any consideration, accepted from the complainant Oliver deeds and bills of sale of all his property with the pretended purpose of assisting Oliver in disposing of his property and realizing any surplus which might remain, after paying his indebtedness, but that said defendant Cunningham took said deeds and conveyances for the joint benefit of himself and his comortgagees.

4. That after the procuring of said conveyances by the defendant Cunningham he entered into a contract to transfer to the defendants George J. Robinson, Calvin Haines, and Phillip M. Ranney all the property
13 thus transferred to him by the complainant, and which was contained in Sections 28 and 29 North, Range 8 East, in Michigan, subject to the encumbrances aforesaid on said property.

5. That the three defendants, Cunningham, Hunt, and Eschelman, associated with themselves the said Calvin Haines, Phillip M. Ranney, George Robinson, Henry M. Robinson, and took the following further steps: That said Haines and Ranney, who composed the firm of C. Haines & Co., without receiving value therefor made an assignment of their mortgage to defendant Garret B. Hunt, and said defendant procured to be assigned to said Garret B. Hunt, for the sum of $6,000, a mortgage held by E. and G. R. Haines, and procured to be assigned to said Henry M. Robinson a mortgage previously held by James B. Wain, and that the defendant Cunningham thereupon, on the 13th day of November, 1868, conveyed to the said defendant' Robinson, Haines and Ranney, the lands and other property of the complainant, the said defendant furnishing the money to pay up the contract prices of lands held under contract from said Theodore Preston, and procured said lands to be conveyed to the defendant Henry S. Cunningham, who thereafter held the same.

6. That having procured all the outstanding claims against the said property, except the said mortgage given to said J. B. Hill, the defendants formed a partnership to carry on lumbering operations on said property, and cut timber and manufactured the same, and that said partnership was carried on under the firm-name of Cunningham, Robinson, Haines & Co, but that in reality the said Cunningham in said partnership rep-
14 resented himself and said Hunt and Eschelman, the said Robinson representing himself, George J. Robinson, and Henry M. Robinson, and the said Haines & Co. representing Calvin Haines and Phillip M. Ranney, and that the capital contributed by Cunningham was the said claim for $35,000 which was owned by himself and Hunt and Eschelman jointly, although the same stood of record in the name of Hunt and Eschelman; that the capital contributed by Robinson consisted of the part-

nership interest held by him in the former firm of Oliver and Robinson and the mortgage of Wain for $10,000, nominally owned by Henry M. Robinson; that the capital contributed by Haines & Co. consisted of the two mortgages which had been given to C. Haines & Co., and to E. and G. R. Haines, both of which were nominally held by Garret D. Hunt.

7. It is further found by the court that after obtaining possession of the said real estate and personal property the said defendants procured said mortgage of $35,000 to be foreclosed out of the expenses of the said firm, and the said lands to be bid in in the name of the said Garret B. Hunt, who thereafter held the same in trust for said firm, and who is hereby found, under the facts in this case, to hold three-quarters of the same in trust for complainant. It is further found that the assignment made by the said Cunningham to his co-mortgagees, Hunt and Eschelman, dated the second day of September, 1868, and recorded January 20th, 1869, in liber 9 of assignments, page 672, in the office of the register of deeds for Alpena County, was, as to this complainant, fraudulent, and did not, in equity, under the circumstances of this case and in view of its concealment from said complainant, change said Cunningham's equitable
15 relation of mortgagee as respects complainant.

9. The contract made at Buffalo on the 3rd day of October, 1868, the terms of which were concealed from Oliver, was also as to complainant fraudulent and void, and that the same should be annulled as to the date thereof and declared of non-effect.

10. As respects the real estate herein described covered by said mortgages, the defendants are to be considered and treated as mortgagees in possession, accountable for the rent, profits, and proceeds of said property.

11th. As respects any portion of said property not covered by said mortgages, but included in this bill of sale from complainant to said Cunningham, the courts find the same was conveyed and transferred to said Cunningham for the purpose of enabling him to satisfy the terms of Oliver's indebtedness hereinbefore set forth, and to then convey the balance to complainant, and three-fourths of all the same except that portion of said land lying outside of Sections 28 and 29 North, Range 8 East were transferred to and used by the defendant, and that they are accountable in this suit for the use and value of the same jointly and severally.

12. That as respects all of said lands lying outside of said sections 28 and 29 North of Range 8 East, except the Preston lands, so called, the court find that an undivided three-fourths of the same belong to said complainant.

13. That as respects the Preston lands, so called, the court finds that the entire of the same belongs to the complainant.

16 14. That defendants came into possession of and employed and converted to their own use the three-quarters interest in the personal property hereinbefore found to have been transferred from said Oliver to said Cunningham, and for the value of which all of the defendants are found to be jointly and severally accountable to complainants; that is to say, for the value of three-fourths of all lumber and logs cut and on hand at the date of said transfer by complainant to said Cunningham; of three-fourths of all the goods in store, and all other personal property, teams, wagons, sleighs, and lumbering utensils on hand at the date of said transfer, and three-fourths of said mill and machinery contained in the

mill upon the said lands at said date of said transfer, and as has since been disposed of.

15. That defendants, after entering into the possession of the lands herein described, cut and removed therefrom a large quantity of timber standing thereon at the date of said transfer by complainant to said Cunningham, for the value of three-fourths of which the said defendants are found to be jointly and severally accountable to complainants.

16th. That afterwards, and about the 17th day of October, 1874, said defendant sold and transferred to Fowler, Merrick & Lyon the pine timber, or a portion thereof, remaining upon said land, to the amount of 23 million feet, at the price of $2 per thousand feet, for three-fourths of which sum of $46,000, to wit, the sum of $34,500, they are held to be likewise jointly and severally accountable to complainant.

17. That on the other hand the defendants should be allowed, and are hereby allowed, the value of all encumbrances and claims against said property owned or acquired by them or paid by them, which the
17–20 court finds to be as follows, to wit: A mortgage of Cunningham, Hunt, and Eschelman, as determined by a decree of this court December 9th, 1872, $47,495; the amount paid David Preston on land contract, $12,289; the amount secured to C. Haines & Co. on mortgage, ; amount paid E. & E. R. Haines for their mortgage, $6,000; the amount paid J. B. Hill on *the* his mortgage, $1,000; the amount of Wain's mortgage, $12,000.

18. The defendant should also be allowed three-quarters of the amounts of the debts, if any, of the firm of Oliver and Robinson, paid by the defendant, as shall be found and reported by the master under the reference to him hereby directed.

19. That defendant should also be allowed three-quarters of the amount paid by them for taxes on the lands herein described, since the date of said transfer to Oliver and Cunningham, except the so-called Preston lands, and as to those all taxes paid, if any.

20. That defendants are also held to be jointly and severally accountable to complainant for three-fourths of the amount realized by them on notes and account due to Oliver and Robinson and transferred to Cunningham, if any, as shall be found by said master.

21. That the particular descriptions of land, an undivided three-fourths interest in which is hereby found to belong to said complainant, are as follows, that is to say:

* * * * * * *

Frac. Section 12, Town. 29, Range 8 East.

* * * * * * *

21 23. It is further ordered that this cause be referred to John J. Speed, a special commissioner, to state an account between the parties in accordance with the terms of this interlocutory decree, and that upon such accounting said complainant be allowed interest on the value of the personal property, and of the issues of all other property, as the same were received by the defendants, and that the defendants be allowed interest on their security and the amounts paid by them for taxes, and on behalf of the complainant.

24. Upon the coming in of said commissioner's report the said complainant will be entitled to a final decree in substantial compliance with the terms of this interlocutory decree.

22 *Final decree.*

DAVID D. OLIVER, COMPLAINANT,
vs.
HENRY S. CUNNINGHAM, GARRET D. HUNT, Jacob Eschelman, Phillip M. Ranney, George J. Robinson, and Henry M. Robinson, defendants.

The decision in this cause was rendered by Judge Withey, of the western district. Judge Brown did not sit in the case. This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

That said defendants pay or cause to be paid to complainant the sum of $41,488.87, and interest thereon at the rate of 7 per cent. per annum from the first day of January, 1882, and that complainant have execution therefor; that said defendant deliver unto complainant a certain bond given by George J. Robinson to complainant on the 16th day of November, 1867, obligating the said Robinson to pay to complainant the sum of $20,000, and which said bond was transferred by complainant to defendant Henry S. Cunningham in September, 1868, and that they also deliver to complainant a certain mortgage collateral to said bond, made and executed on said 16th day of November, 1867, and recorded in the office of the register of deeds for Alpena County on the 22nd day of November, 1867,
23–28 in liber A of mortgages, pages 427 and 428, and that said defendant Cunningham, who of record has title to said bond and mortgage, make, execute, and deliver, in proper form, an assignment of said bond and mortgage to complainant within 30 days from the entry of this decree, and that in default thereof this decree may be the record as evidence of the transfer of said mortgage to said complainant, and stand in of such an assignment. That said defendants do surrender and yield up to complainant possession of all lands transferred by said complainant to defendant Cunningham by deeds dated September 3rd, 1868; and in case of their refusal to surrender and deliver possession after due demand of said lands, complainant will be entitled to the usual writ of assistance to obtain possession thereof; and that defendant shall make, execute, and deliver to complainant good and sufficient deed which shall be held as transferring all their title and interest in and to said land described in said deeds, and which shall describe and specify said lands as follows:

The entirty of the following lands:

* * * * * * *

Entire fractional Sec. 12, Town. 29 North, Range 8 East.

* * * * * * *

29 That said defendants make, execute, and deliver such deed conveying said lands as above described within 30 days from the entry of this decree, or in default thereof this decree may be regarded and the same shall stand as sufficient evidence of defendant's title in and to all of said lands. It is further ordered, adjudged, and decreed that the plaintiff do recover from the defendant his costs to be taxed, including in said costs the sum of $600 paid by him to the master for services on the

reference, and as part of the disbursements for witness fees and commissioner's fees on said reference. And it is further ordered that whereas pending the litigation of this suit, and before any interlocutory decree therein, about the 7th day of June, 1879, the United States district court for the northern district of New York, in bankruptcy, wherein were pending bankruptcy proceedings upon the estate of defendant Henry S. Cunningham and Calvin Haines, each of whom had been duly adjudicated bankrupts in said court, made and entered an order that said David D. Oliver have leave to prosecute the action wherein the entry of this decree now entered against Henry F. Cunningham, Calvin Haines, et al. to a final decree and ascertain the amount due from the said Cunningham, Haines, et al. to the said Oliver in and by this suit; and whereas subsequently thereto, and prior to the 8th day of March, 1880, the said defendants Henry F. Cunningham and Calvin Haines moved and petitioned this court for a stay of proceedings in this cause pending the decision and determination of their several applications for a discharge in bankruptcy, and upon due consideration had it was ordered that said motion and petition be denied; but it was provided, however, in and by said order that inasmuch as said United
30 *United* States district court for the northern district of New York had allowed this suit to be prosecuted to decree as against said Henry S. Cunningham and Calvin Haines, in order to ascertain and fix the amount of complainant's claim against their respective estates in bankruptcy; therefore if any decree should pass against said defendants Cunningham or Haines, or either of them in this cause, making them personally liable in any amount, the said decree should stand, with reference to their discharge in bankruptcy, the same in all respects, and be operated upon by any decision in bankruptcy, which either of them might obtain, as fully as said decree in bankruptcy might or could operate upon or affect the claim for personal liability upon which said decree is founded, and no further. And whereas subsequent thereto, and upon the 26th day of April, 1881, said defendant Henry S. Cunningham received his final discharge in bankruptcy from the district court of the United States for the northern district of New York, in bankruptcy, in the usual form of law, and the said defendant Calvin Haines, on the 26th day of April, A. D. 1881, received from the United States district court for the northern district of New York, in bankruptcy, his final discharge in due form of law, it is further ordered, adjudged, and decreed that so much of this decree as declares a personal liability against said defendant' Henry S. Cunningham and Calvin Haines, in the amount named in the first paragraph, or in any amount whatsoever, be held and considered as to the defendants Cunningham and Haines, and as to either of them, and be operated upon and affected by their several discharges in bankruptcy, the same as said discharge in bankruptcy might or could operate upon or affect the claim for
31 personal liability upon which this decree is founded, and no further.

The defendants Hunt and Eschelman now here in open court, by Henry M. Duffield, their solicitor, claim an appeal to the Supreme Court of the United States from the above decree.

32 1. *Motion for writ.*

In the circuit court of the United States for the eastern district of Michigan. In equity.

DAVID D. OLIVER
vs.
HENRY S. CUNNINGHAM, GARRET B. HUNT, Jacob Eschelman, Philip M. Ranney, George I. Robinson, and Henry M. Robinson.

And now comes the said complainant and moves the court now here that a writ of assistance be issued from said court in said cause to put complainant in possession of all lands in controversy in said cause, not affected by the appeal taken herein by defendants Hunt and Eschelman.

The said motion is based upon the proceedings in said cause and the affidavit of David D. Oliver herewith filed.

ALFRED RUSSELL,
Sol'r for Complainant.

The foregoing motion will be brought on for hearing on Monday, the eighth day of January, 1883.

ALFRED RUSSELL,
Sol'r for Comp't.

33–36 2. *Affidavit in support of motion for writ.*

In the circuit court of the United States for the eastern district of Michigan. In equity.

DAVID D. OLIVER
vs.
HENRY S. CUNNINGHAM, GARRET B. HUNT, Jacob Eschelman, Calvin Haines, Philip M. Ranney, George I. Robinson, Henry M. Robinson.

STATE AND EASTERN DISTRICT OF MICHIGAN, *ss:*

David D. Oliver, being duly sworn, deposes and says that on the 21st day of September, 1882, this court made and entered a decree in the above-entitled cause, in which, among other things, it was ordered that the above-named defendants surrender and yield up possession to complainant of all the lands transferred by complainant to defendant Cunningham by deeds dated September 3d, 1868.

That defendants Garret B. Hunt and Jacob Eschelman have taken an appeal from the decree of this court to the Supreme Court, and that such appeal was taken and a bond staying the execution of said decree against them was filed within the sixty days limited for staying execution in cases of appeal, but that said defendants Henry S. Cunningham, Calvin Haines, Philip M. Ranney, George I. Robinson, and Henry M. Robinson have not appealed from said decree, and the sixty days during which they might appeal and stay the execution of said decree have expired.

That defendants Hunt and Eschelman were seized of the record or legal fee to only a portion of the lands described in said decree and had no record or legal title to the following-described lands: The North half of Section number twelve, in Township twenty-nine North, of Range eight East. Also the following lands:

* * * * * * *

37 That some of said lands are not actually occupied by any person, and complainant has not been prevented from taking possession of such lands as were not so occupied; but the North half of Section twelve, in Town. 29 North, of Range eight East is actually occupied by Lee R. Sanborn and William H. Sanborn, who entered into occupation thereof since complainant filed his bill in this cause, and since complainant caused to be recorded in the office of the register of deeds for Alpena County a notice of the pendency of this suit, and that said Lee R. Sanborn and Wm. H. Sanborn occupy the same, and through said defendant Henry S. Cunningham.

Deponent further says that he has heretofore, on or about the day of November, , gone to said premises and demanded of William H. Sanborn, who was then upon said premises, claiming to control the same, that he yield and deliver up possession of said premises to deponent, the complainant in said cause, and at the same time he exhibited to said William H. Sanborn a duly certified copy of the said decree and allowed said William H. Sanborn to take such certified copy into his hands and to read the same; but that said William H. Sanborn, after such demand and after seeing said decree as aforesaid, refused to deliver up possession of said premises, and continued, and still does continue, to occupy and use said premises and to exclude complainant therefrom.

DAVID D. OLIVER.

38, 39 Subscribed and sworn to before me this 26th day of December, 1882.

CHARLES F. BURTON,
Notary Public, Wayne Co., Mich.

COUNTY OF ALPENA, *ss:*

E. H. Toland, being duly sworn, says that on the 30th day of December, , he served a motion, a copy of which is hereto attached, together with a copy of the affidavit of David D. Oliver, attached hereto, and notice for the hearing of said motion on William H. Sanborn, at Ossinike, by delivering the same to him personally.

E. H. TOLAND.

Subscribed and sworn to before me this 30th day of December, 1882.

THOMAS COLLINS,
Notary Public, Alpena County, Mich.

* * * * * * *

Plat—copy of which is attached to original petition in this court.

* * * * * * *

40 3. *Affidavit of Wm. Mirr in opposition to motion.*

In the circuit court of the United States for the eastern district of Michigan. In equity.

DAVID D. OLIVER
vs.
HENRY S. CUNNINGHAM, GARRET B. HUNT, Jacob Eschelman, Philip M. Ranney, Calvin Haines, George I. Robinson, and Henry M. Robinson.

ALPENA COUNTY, *ss:*

William Mirr, being duly sworn, deposes and says that he resides in the city of Alpena, Michigan; that he is a surveyor by occupation, and has been engaged in that occupation for the past 15 years and upwards, and that he at the present time holds the office of city surveyor for the city of Alpena, and county surveyor for the county of Alpena, Michigan; that as such county surveyor he has in his possession the field-notes of the original Government survey of fractional Section 12, in Town. 29 North, of Range 8 East; that from said field-notes this deponent has made a careful computation of the number of acres in said fractional Section 12, and finds the number of acres in said fractional Section 12 as follows: In lot No. 1, 55.70 acres; lot 2, 68 acres; lot 3, 65.35 acres; and the SW. ¼ of SW. fractional ¼ 40 acres, making a total of 227.05 acres in
41 said fractional Section 12, as originally surveyed by the Government; that deponent has prepared a map of said fractional Section 12 from said field-notes, which is hereunto annexed, marked "Exhibit A," and made a part hereof.

That this deponent, on the 11th day of January, A. D. 1883, made a survey at the mouth of Devil River, which empties into Thunder Bay through said fractional Section 12, for the purpose of locating the mill built by David D. Oliver, and which was destroyed by fire in 1872, and showing the location thereof, and of the mill built by Lee R. Sanborn, and the docks and improvements upon said map, Exhibit A, and which are located upon said fractional Section 12. That deponent found the foundations and site of the Oliver mill where it stood before it was burned, and that the same are distinct and plain. That from said survey so made deponent found that the South line of said Oliver mill was 8 rods North of the centre line running East through said fractional Section 12, starting at the quarter post between Sections 11 and 12, and that the mill built by said Lee R. Sanborn and now standing thereon and all the docks are north of said Oliver mill site, and that the said mill which was destroyed by fire in 1872, and the docks and improvements used in connection with the same, are all upon the North fractional half of said fractional Section 12.

42 This deponent further says that the site of the Oliver mill is shown upon the map, Exhibit A, and is marked "Old mill burned down." That the black lines upon said map, Exhibit A, show the lines of the original Government survey of said fractional Section 12, as shown by the field-notes. That the blue lines enclose the improvements on the

east side of said Devil River, which it is claimed were made upon said fractional Section 12, before Lee R. Sanborn took possession thereof, and that the red lines show the improvements which it is claimed have been made by said Lee R. Sanborn, together with the made land and mill on the west side of the mouth of said Devil River, and the extension of the dock on the east side of the mouth of said Devil River. That deponent has compared the map, Exhibit A, with the copy of the original map of the Government survey ot said fractional Section 12 which he obtained from the commissioner of the State land office, at Lansing, and the same is correct and in accordance with said map original survey; and further deponent says not.

WILLIAM MIRR.

Subscribed & sworn to before me this 11th day of January, A. D. 1883.

JUDSON D. HOLMES,
Notary Public, Alpena County, Michigan.

43 Ex. 4.—*Affidavit of Wm. H. Sanborn in opposition to motion.*

In the circuit court of the United States for the eastern district of Michigan. In equity.

DAVID D. OLIVER
vs.
HENRY S. CUNNINGHAM, GARRET B. HUNT, Jacob Eschelman, Philip M. Ranney, Calvin Haines, George I. Robinson, and Henry M. Robinson.

ALPENA COUNTY, *ss:*

William H. Sanborn, being duly sworn, deposes and says that he resides in the township of Ossineke, county of Alpena and State of Michigan; that he has been a resident of said township since the month of September, 1873, and that he is a son of Lee R. Sanborn, of Sanborn, New York, and was in the employ of said Lee R. Sanborn, as general manager of said Lee R. Sanborn's business at Ossineke, Michigan, from September, 1873, until about the 1st of September, 1878, when he formed a partnership with said Lee R. Sanborn, under the firm-name of L. R. Sanborn & Son, and said firm, under the management of deponent, has, since 1878, continued in business at Ossineke, and are still engaged in manufacturing lumber at said Ossineke.

44 This deponent further says that Lee R. Sanborn, in the month of March, 1873, leased of Cunningham, Robinson, Haines, & Ranney, defendants named in the above-entitled cause, certain buildings and the mill site at the mouth of Devil River, in Fractional Section 12, in Town. 29 North, Range 8 East, and that under said lease he took possession of said property the last of April, 1873, and immediately began the erection of a steam saw-mill, in the waters of Thunder Bay, about 25 rods north of the then shore line, and west of the mouth of Devil River; that in connection with said saw-mill said Lee R. Sanborn extended the docks, filled in the land from the shore to the mill, built breakwater for boom, and constructed booms for storing and booming logs, and repaired and maintained the docks

which he found at the mouth of said Devil River, in the month of April, 1873, when he took possession of said premises.

This deponent further says that said Lee R. Sanborn continued in possession of said premises, and to run and operate the mill which he built at the mouth of Devil River, from the time he took possession thereof, until the month of June, 1876, when said Lee R. Sanborn, as deponent is informed and believes, with the knowledge and consent of the parties from whom he, said Lee R. Sanborn, had leased said premises, purchased the north fractional half of said Fractional Section 12, Town. 29 North, Range 8 East, of Garret B. Hunt,
45 who claimed to own the same, and who claimed to have acquired a title to said lands after the execution of the lease to said Lee R. Sanborn by said Cunningham, Robinson, Haines, & Ranney, and that said Lee R. Sanborn caused to be recorded in the office of the register of deeds for Alpena County, in the month of July, 1876, the deed which he had received of said Hunt for said lands; and that from that time forward said Lee R. Sanborn continued in the quiet and peaceable possession and occupancy of the said north fractional half of fractional section 12, until about the 1st of September, 1878, when deponent entered into partnership with him, and since that time they have occupied said lands and premises and run and operated said mill until the present time together, and they still hold and retain possession thereof; and the possession which said Lee R. Sanborn and said Lee R. Sanborn and deponent have had and held since June, 1876, of said mill and improvements at the mouth of said Devil River on said north fractional half of said fractional section 12, has been under a claim of ownership, and that said Lee R. Sanborn was the absolute owner thereof.

This deponent further says that the mill built by said Lee R. Sanborn, together with the docks and improvements made by him at the
46 mouth of Devil River, are all situated upon the North fractional half of said Fractional Section 12, Town. 29 North, Range 8 East. That since said Lee R. Sanborn has been in possession of the said lands and premises last above described, said Lee R. Sanborn and this deponent at their own cost and expense have made, created, and maintained thereon valuable improvements of a permanent character, which cannot be removed therefrom, and that the value of said permanent improvements so made by them, and which cannot be removed therefrom, outside of not including the mill and machinery, is at least $3,000, according to the best judgment of this deponent, and that the value of said mill and machinery is $12,000 dollars.

This deponent further says that he first saw David D. Oliver, the complainant in the above-entitled cause, at Alpena, in the summer of 1876 or 1877, and that since that time he has seen said Oliver at Alpena and Ossinike every year, and for the past three years said Oliver has been quite frequently at Ossinike, and during the past three years deponent has had more or less conversation with said Oliver. That during all the time deponent has known said Oliver, he, said Oliver, knew that said Lee R. Sanborn and deponent were running and operating said mill at the mouth of Devil River, and were in possession of said north fractional half
47 of said fractional section 12.

That said Oliver never attempted to interfere with the possession

of said Lee R. Sanborn and deponent of said lands last above described or to their right to use and occupy the same, and that said Oliver has never to the knowledge of deponent made any claim of ownership to said lands and premises until a few days before the 1st of December, 1882, when he, said Oliver, showed deponent a copy of what he claimed and what purported to be a decree entered in the above-entitled cause, and at the same time demanded verbally of deponent the possession of the property mentioned and described in said decree.

This deponent further says that said Lee R. Sanborn and deponent are now in possession of the said North fractional half of fractional Section 12, and hold and claim said possession thereof, under claim of ownership derived from said Garrett B. Hunt, by the deed thereof, of June 1876. That they have made at their own cost and expense during the last season extensive repairs to the docks situated thereon, and that said Oliver was at Ossineke and on said docks while said repairs were being so made by them, and had full knowledge that the same were being so made by them, and had full knowledge that the same were being made by said Lee R.
48 Sanborn and deponent, and that he, said Oliver, made no objection to the same being made. Nor did the said Oliver make any claim of right to or ownership in said lands, docks, or premises at that time to deponent or to any one else to the knowledge of this deponent, and this deponent believes and so charges the fact to be that he, said Oliver, knew at the time said improvements and repairs were being made as aforesaid that they were being made by said Lee R. Sanborn and deponent as the owners of said property and docks. That the real value of said North fractional half of fractional Section 12, consists in the mill and docks which said Lee R. Sanborn and deponent have repaired, constructed and maintained thereon, and that they require constant care and expense to keep them in serviceable condition.

This deponent further says that he has held the office of supervisor for the township of Ossineke for the past four years. That he is acquainted with and knows the situation of the lands described in the mortgage given by David D. Oliver and wife to Garret B. Hunt, Jacob Eschelman, and Henry S. Cunningham, dated Nov'r 17th, 1866. That said lands described in said mortgage are situated in and near to the stream known and called Devil River.

This deponent further says that he has examined the map or plat of said fractional Section 12, Town, 29 North, of Range 8 East, attached to the affidavit of William Mirr, and marked "Exhibit A," and that the position of the Oliver mill that was burned
49 in the fall of 1872, and of the mill built by Lee R. Sanborn in 1873, and the improvements made thereon are, as shown on said map Exhibit A, *are* relatively correct; that that portion of the docks as shown on said map which are on the east side of the mouth of Devil River and enclosed in the red lines, show the improvements and additions which have been made thereto by Lee R. Sanborn, and that the docks, breakwater, mill, made land, booms and boomage, shown upon the said map on the west side of the mouth of Devil River, have all been constructed and maintained by Lee R. Sanborn and deponent, and that the docks on the east side of the mouth of said Devil River embraced in the blue lines in said map were the ones that were built before said Lee R. Sanborn took pos-

session thereof, and have since been maintained and kept in repair by him and deponent.

This deponent further says that during the month of September, 1882, said Lee R. Sanborn and deponent, being desirous of improving the capacity of their mill situated at the mouth of said Devil River, and on said North fractional half of fractional Section 12, built an addition thereto on the east end thereof of 32 feet, at the cost and expense of $350, and that said Oliver knew they were making said improvement and addition to said mill, but he, said Oliver, made no objection to the same being made,
50 and made no claim to or right of ownership in said mill, land, or premises. And deponent further says that said Lee R. Sanborn and deponent, before said Oliver made demand in November last upon deponent for the possession of said mill and premises, had made contracts with various parties to supply said mill with logs for the sawing season of 1883, and if they are now compelled to remove said mill and deliver possession of said premises to said Oliver it will work a great hardship to them and result in great loss and damage and almost an entire destruction of their business, as they cannot now obtain another mill-site and remove said mill thereto so as to accomplish much, if any, work, or keep their contracts for the year 1883. And further deponent says not.

WM. H. SANBORN.

Subscribed and sworn to before me this 11th day of January, A. D. 1883.

JUDSON D. HOLMES,
Notary Public, Alpena County, Mich.

51 5.—*Affidavit of Dougald McArthur in opposition to motion.*

In the circuit court of the United States for the eastern district of Michigan. In equity.

DAVID D. OLIVER
vs.
HENRY S. CUNNINGHAM, GARRET B. HUNT, Jacob Eschelman, Philip M. Ranney, Calvin Haines, George I. Robinson, and Henry M. Robinson.

ALPENA COUNTY, *ss:*

Dougal McArthur, being duly sworn, deposes and says that he has been a resident of Alpena County, State of Michigan, for the past 18 years and upwards. That he knows the above-named complainant David D. Oliver, and knew him in the year 1866, when said Oliver was engaged in building a steam saw-mill at the mouth of Devil River, in Ossineke Township, in Alpena County. That said Oliver was engaged in erecting a steam saw-mill during the summer of 1866, and winter of 1866 & 1867, on fractional Section 12, in Town. 29 North, of Range 8 East, at or near the mouth of Devil River. That said mill so built by said Oliver during the summer of 1866, commenced running early in the spring of 1867, and was operated by said Oliver that season. That deponent was engaged during the summer of 1867 in building docks for said Oliver at

52 the mouth of said Devil River, to be used in operating and in connection with said mill, and that during the winter of 1867 & 1868 deponent was engaged in lumbering for Oliver and Robinson on the waters of Devil River, and that during the sawing season of 1868 said mill was run and operated by Oliver & Robinson, and that during the sawing seasons of 1869, 1870, 1871, and 1872 said mill was run and operated by Cunningham, Robinson, Haines, and Ranney, defendants named in the above-entitled cause. That during the forepart of the month of November, 1872, said mill was destroyed by fire, and said mill has never been rebuilt, and further deponent says not.

DOUGALD McARTHUR.

Subscribed and sworn to before me this 11th day of January, A. D. 1883.

JUDSON D. HOLMES,
Notary Public, Alpena County, Michigan.

53 This agreement made this 17th day of November, 1866, between Garret B. Hunt, Henry S. Cunningham, and Jacob Eschelman, party of the first part, and Daniel D. Oliver, party of the second part, witnesseth:

That said party of the second part hereby agrees to buy of said party of the first part, all the lands which they, said party of the first part, or either of them, own or have an interest in, in the county of Alpena, State of Michigan, being about 5,600 acres, for the sum and price of $35,000, to be paid as follows: $5,000 thereof July 1st, 1867; $10,000 thereof October 1st, 1867; $5,000 thereof July 1st, 1868; $5,000 thereof October 1st, 1868; $5,000 thereof July 1st, 1869; 1869; $5,000 thereof October 1st, 1869, with annual interest on all unpaid on the 1st day of October in each year, with the privilege of paying the principal sum at any time sooner in sums not less than $1,500 at a time; and said Oliver agrees to purchase said property for the price aforesaid, and to secure said purchase-money with his bond, which he has this day executed, secured by a mortgage upon said property, and upon 3,000 acres of pine lands in Town. 28 & 29, Range 8 East, in counties of Alcona and Alpena, Michigan, and also on the following other lands situate in Town. 29 North, Range 8 East, in said county of Alpena, to wit: Entire Section 20, 640 acres; E ½ of Section 19, NW. ¼ & NE. ¼ of SW.
54 ¼ of Sec. 19; fractional Section 12, with saw-mill and other improvements; S. ½ of Section 11; N. ½ of Section 14; W. ½ of SW. ¼ of Section 14; S. ½ of NE. ¼ and S. ½ of NW. ¼ and S. ½ of Section 15; W. ½ of NW. ¼ of Section 11; E. ½ of NE. ¼ and E. ½ and NW. ¼ of Section 10; NW. fract'l quarter, and N. ½ of SW. ¼, Section 2; SW. ¼ of SW. ¼ of Section 6, and NW. ¼ of NW. ¼ of Section 7, and SW. ¼ of SW. ¼ of Section 5, & SE. ¼ of SE. ¼ of Section 6, & NE. ¼ of NE. ¼ of Section 7, and NW. ¼ of NW. ¼ of Section 8. The title of the aforesaid lands to be perfect in said Oliver, free from all incumbrances.

And said party of the first part agree that if the said Oliver shall execute and deliver to them within 30 days, a good, valid bond for the payment of said moneys as aforesaid, and of a good and valid mortgage on all of the aforesaid property, including the property purchased (the title of all which shall be perfect and free from all incumbrances), to secure the

payment of said bond and said monies as aforesaid, with a clause that if default be made in the payment of said interest, or of said payments as above specified for the space of 30 days, then the whole sum to fall due; and shall furnish at the same time a title search showing a title to all of said lands others than those purchased of said party of the first part perfect in the said Oliver, free clear of all incumbrances, the said party of the first part will convey the property which they or either of them own
55 or have an interest in said county of Alpena, to said Oliver; the title to the said property to be perfect and free from all incumbrances, and the wife of said Oliver to join in said mortgage. The said party of the second part to convey, by good warranty deed, and the title to the property which they shall so convey to be perfect in them free from all incumbrances.

Dated Buffalo, November 17th, 1866.

GARRET B. HUNT.
JACOB ESCHELMAN.
H. S. CUNNINGHAM.
DAVID D. OLIVER.

[H. S., Nov. 17, 1866.—Stamp.]

NORTHERN DISTRICT OF NEW YORK, *ss:*

I, James C. Strong, a duly authorized commissioner of the United States circuit court in and for said district, do hereby certify that I have compared the within copy with the original agreement of which it purports to be a copy, and found it to be a true copy thereof, and of the whole thereof.

[SEAL.] JAMES C. STRONG,
U. S. C. C. Commissioner.

56 6. *Affidavit of Henry S. Cunningham in opposition to motion.*

In the circuit court of the United States for the eastern district of Michigan. In equity.

DAVID D. OLIVER, COMPL'T,
vs.
HENRY S. CUNNINGHAM, GARRET B. HUNT, Jacob Eschelman, Calvin Haines, Philip M. Ranney, Henry M. Robinson, & George I. Robinson.

Henry S. Cunningham, being duly sworn, deposes and says that he is one of the persons named in the above-entitled cause; that he is well acquainted with David D. Oliver, Garret B. Hunt, and Jacob Eschelman, also therein named. That on or about the 17th day of November, A. D. 1866, the aforesaid David D. Oliver entered into an agreement with the aforesaid Garret B. Hunt, Jacob Eschelman, and Henry S. Cunningham, a true copy of which is hereto annexed. That this deponent is well acquainted with the handwriting of each of the said parties, to wit, David D. Oliver, Garret B. Hunt, and Jacob Eschelman; and the signatures written at the close of the original agreement, of which the annexed is a true copy, are in the handwriting of the said David D. Oliver, Garret B. Hunt,

and Jacob Eschelman, respectively; and that the signature of H.
57 S. Cunningham is in the handwriting of the aforesaid Garret B. Hunt, who did then and there sign the same at the request of this deponent, but the cancelling of the stamp is in the handwriting of this deponent.

Deponent further says that at the time of the making of the contract aforesaid, and the execution and delivery of the mortgage made in pursuance thereof, the site of the mill, together with the lumber docks connected therewith of the said David D. Oliver, the mortgagor, was principally on the north fractional part of said Section 12, Town. 29 N., R. 8 East; and deponent further says that pending negotiations which resulted in making the agreement, a copy of which is hereto annexed, including the execution and delivery of the aforesaid mortgage, the said David D. Oliver represented to this deponent and Garret B. Hunt and Jacob Eschelman that the said mill site, lumber docks, and other improvements on said section 12 were a part and parcel of the mortgaged premises, and this deponent and said Hunt and Eschelman relied greatly upon the value of said mill and docks as collateral security, inasmuch as that portion of the lands mortgaged, so far as they had then seen, had been principally stripped of the pine, and the said Oliver paid nothing and was not restrained from cutting any or all the valuable timber on any or all the lands.

58 Deponent further says that according to his *his* recollection that part of the mortgage which relates to section 12 is in the handwriting of the aforesaid Oliver, and that the sentence referring especially to said section 12 avers that it contains $227\frac{05}{100}$ acres, which is the whole number of acres contained in the entire fractional section twelve according to the Government survey thereof.

H. S. CUNNINGHAM.

Sworn to before me this 13th day of January, 1883, at Buffalo, N. Y., in the northern district of New York.

[SEAL.] JAMES C. STRONG,
U. S. Circuit Court Commissioner in and for said Northern District of N. Y.

(Endorsed:) 1640. In the cir't court U. S. for eas'n dist. of Mich. In equity. David D. Oliver vs. Henry S. Cunningham et al. Affidavit of Wm. Mirr, Wm. H. Sanborn, Dougald McArthur, and Henry S. Cunningham. Filed in clerk's office April 7th, 1883. Walter S. Harsha, clerk.

59 7. *Affidavit of Garret B. Hunt in opposition to motion.*

In the circuit court of the United States for the eastern district of Michigan. In equity.

DAVID D. OLIVER
vs.
HENRY S. CUNNINGHAM, GARRET B. HUNT, Jacob Eschelmen, Calvin Haines, Philip M. Ranney, Henry M. Robinson, & George I. Robinson.

Garret B. Hunt, being duly sworn, deposes and says that he is one of

the parties named in the above-entitled cause; that on or about the 17th day of November, 1866, David D. Oliver, the above-named complainant, entered into an agreement in writing with this deponent and Henry S. Cunningham & Jacob Eschelman to purchase certain lands from them located in Alpena County, Michigan, and to secure the purchase-price thereof by a mortgage bearing even date with said agreement upon the lands so by him, the said Oliver, purchased, and also certain other lands situate in said county of Alpena, as collateral security for the purchase-price of the first-named lands; that in pursuance of said agreement said Oliver did so execute & deliver the said mortgage as aforesaid, bearing even date with said agreement.

And this deponent further says that among the lands enumerated in said agreement as lands that should be by said Oliver mortgaged to this deponent and said Henry S. Cunningham and Jacob Eschelman as col-
60 lateral security as aforesaid was fractional Section twelve, in Township twenty-nine North, Range eight East, with saw-mill and other improvements. And deponent further says that at all times during the negotiations which resulted in the agreement for purchase and sale as aforesaid and the execution of the mortgage as aforesaid the said Oliver represented to this deponent that his said mill, mill site, docks, and other improvements were located at the mouth of Devil River, in said county of Alpena, on the aforesaid section twelve, and were a part and parcel of the collateral security for the purchase-price of the lands so by him, the said Oliver, purchased as aforesaid. And this deponent always believed, and still believes, that the whole of said fractional section twelve, together with the mill site, docks, and other improvements on said section twelve was included in and covered by said Oliver's mortgage of November 17, 1866, to him, said deponent, and Henry S. Cunningham & Jacob Eschelman, and that he obtained a good, full, and sufficient title thereto under his purchase of the same, together with other lands, under and by virtue of the sale made to me under the foreclosure of said mortgage aforesaid.

(S'd) GARRET B. HUNT.

U. S. circuit court, northern district of New York, ss.

I hereby certify that the above-named Garret B. Hunt personally appeared before me on this 15th day of January, 1883, and duly made
61 oath that the facts set forth in the foregoing affidavit by him subscribed are true.

[U. S. COM. SEAL.] JAMES C. STRONG,
U. S. C. C. Commissioner in & for said Northern District of New York.

(Indorsed:) 1640. In the circuit court of U. S. for eastern district of Michigan. In equity. David D. Oliver vs. Henry S. Cunningham et al. Affidavit of Garret B. Hunt. Filed in clerk's office April 7th, 1883. Walter S. Harsha, clerk.

61½ STATE OF MICHIGAN,
County of Alpena, ss:

I hereby certify that the foregoing is a true transcript, compared by me with the original in my office, and recorded in liber 6 of deeds, on pages

36 & 37, in Alpena County records, and of the whole of said original record.

JOHN F. KELLY,
Register of Deeds.

ALPENA, MICH., *Jan. 10th*, 1883.

62 *Exhibit A referred to in annexed affidavit.—John E. Pounds, U. S. C. c't com'r.*

Garret B. Hunt & wife to Lee R. Sanborn—Quitclaim deed.

Rec'd for record the 17th day of July, 1876, at 4.40 o'clock p. m.
ALEX. McDONALD,
Register.

This identure, made this 26th day of June, in the year of our Lord 1876, between Garret B. Hunt and Cynthia E. Hunt, of the first part, and Lee R. Sanborn, of Sanborn, in the county of Niagara and State of New York, of the second part, witnesseth:

That the said party of the first part, in consideration of the sum of $100 to them in hand paid by said party of the second part, the receipt whereof is hereby confessed and acknowledged, have bargained, sold, remised, and quitclaimed, and by these presents do bargain, sell, remise, and quitclaim unto the said party of the second part, and to his heirs and assigns, all that piece or parcel of land situate in the township of Ossinike, county of Alpena, and State of Michigan, and described as the Southwest fraction of the Northwest quarter of Section 12, Township 29, Range 8 East, together with all and singular the hereditaments and appurtenances thereto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate right, title, interest, claim, and demand whatsoever of the said party
63 of the first part, either in law or equity, of, in, and to the above-bargained premises, with the said hereditaments and appurtenances: To have and to hold the same to the said party of the second part, his heirs and assigns, to the sole and only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns forever.

In witness whereof the parties of the first part have hereunto set their hands and seals the day and year first above written.

GARRET B. HUNT. [L. S.]
CYNTHIA E. HUNT. [L. S.]

Sealed & delivered in presence of—

STATE OF NEW YORK,
Erie County, ss:

On this 14th day of July, in the year 1876, before me, the subscriber, personally appeared Garret B. Hunt and Cynthia E. Hunt, his wife, to me known to be the same persons described in, and who executed the within instrument and severally acknowledged that they executed the same; and the said Cynthia E. Hunt, on a private examination by me

apart from the said husband, acknowledged that she executed the same freely and without any fear or compulsion of her said husband.

GEO. STAN. POTTER,
Notary Public in and for Erie County, New York.

STATE OF NEW YORK,
Erie County, Clerk's Office, ss:

64 I, George L. Remington, clerk of said county and of the courts thereof, the same being courts of record, do hereby certify that George Starr Potter, whose name is subscribed to the proof or acknowledgement, a notary public in and for said county, duly commissioned, sworn, and authorized to take the same; and further that I am well acquainted with his handwriting, and verily believe that the signature to said proof or acknowledgement is genuine; and further that the annexed instrument is executed and acknowledged according to the laws of the State of New York.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at Buffalo, the 14th day of July, A. D. 1876.

[SEAL.] MARCUS BARTLET,
Deputy Clerk.

65 8. *Affidavit of Lee R. Sanborn in opposition to motion.*

In the circuit court of the United States for the eastern district of Michigan. In equity.

DAVID D. OLIVER, COMPL'T,
ag'st
HENRY S. CUNNINGHAM, GARRET B. HUNT, Jacob Eschelman, Calvin Haines, Philip M. Ranney, Henry M. Robinson, and George I. Robinson, def'ts.

NORTHERN DISTRICT OF NEW YORK, *ss:*

Lee R. Sanborn, being duly sworn, doth depose and say that he resides at Sanborn, in the county of Niagara and State of New York; that he is the same person named as grantee in a certain deed from Garret B. Hunt and wife, dated June 26, 1876, and recorded in the register's office of Alpena County, Michigan, in Liber 6, of deeds, at pages 36 & 37, a certified copy of which is hereto attached, and marked "Exhibit A," and to which reference is hereby made; that he is in possession of the premises described in said deed, and has been since the date thereof under said deed; that at the date of said deed said Hunt claimed title to the premises therein
66 described through the master's deed in the above-entitled action; that deponent bought said premises in good faith, relying on such title; that possession of the said premises was given deponent by George I. Robinson, who bid the lands in in the name of said Hunt at the master's sale; that deponent has had continued and peaceable possession of the premises since the date of said deed, and has made valuable improvements thereon; that before the date of said deed there had been a saw-mill upon a portion of said premises, near the southeast corner thereof, which, before

that date, had burned down, and when deponent took possession there was no saw-mill on said premises; that said premises lay upon Thunder Bay, which bounds them on the north and east; that for three years before the date of said deed deponent was in possession of said premises, as the lessee of the defendants Cunningham, Haines, and Robinson, and it was before such possession said mill was burned; that while in possession of said premises, as such lessee, and afterwards, deponent made valuable improvements thereon; that he built a new saw-mill, and repaired and extended the docks, and filled in around said mill to a large extent, and made a valuable boomage for logs; that deponent has laid out and expended in making said improvements on said premises at least ten thousand dollars during the time he has been in possession of said premises as aforesaid.

67 LEE R. SANBORN.

Subscribed and sworn to before me this 18th day of January, A. D. 1883.

[SEAL.] JOHN E. POUNDS,
United States Circuit Court Commissioner in and for the Northern District of New York.

68 *Order for writ of assistance.*

DAVID D. OLIVER, COMPLAINANT, *vs.* HENRY S. CUNNINGHAM, GARRETT B. HUNT, Jacob Eschelman, Philip M. Ranney, Calvin Haines, George J. J. Robinson, and Henry M. Robinson, defendants.	In the matter of a writ of assistance.

It having been ordered in this cause, on the 22d day of January, 1882, that the motion by complainant for a writ of assistance be argued before Judge Withey, of the western district, who tried the cause, and the motion having been heard before a'd determined by said judge, it is by the court determined and ordered as follows, viz:

In this cause the application of complainant for a writ of assistance to the marshal of this district, to direct him to place complainant in possession of certain lands in said application described, came on to be heard, and the court having considered the application, the affidavits of the parties, and the arguments of counsel determines that complainant, David D. Oliver, is entitled under the decree in this cause to the immediate possession of an undivided three-fourths of the North half of Section twelve, in Township twenty-nine North, of Range eight East, in the State of Michigan, in common with George J. Robinson, owner of the other undivided one-fourth of said land and with those in possession under him,

69–72 and that the right of said Oliver to possession is not affected by the appeal from said decree by defendants Garrett B. Hunt and Jacob Eschelman, or by the supersedeas bond given on their said appeal, the court orders, adjudges, and decrees that the writ of this court issue to the marshal of said district to enter upon the said premises and eject therefrom all persons now holding the said undivided three-fourths of said land or any portion thereof adversely to said David D. Oliver, who have entered

under claim derived from the defendants or any of them since March 13th, 1873, and to forthwith put the said David D. Oliver in possession of said North half of Section twelve aforesaid in common with the owner of the other undivided one-fourth interest thereof, or with Lee R. Sanborn, lessee under such owner, and cause the said David D. *Oli* Oliver to be maintained in the peaceable possession thereof.

It is further ordered and decreed that said complainant is entitled to the possession of the following-described premises:

73 And that said writ of this court also direct the said marshal to enter upon the said premises and eject therefrom every person holding the same and every part thereof adversely to said David D. Oliver, who has entered under claim derived since March 13th, 1873, from said defendants or any of them, and forthwith put said David D. Oliver in possession of said premises, and cause him to be maintained in the possession thereof as against all such persons.

74 United States circuit court, eastern district Michigan.

DAVID D. OLIVER
vs.
HENRY S. CUNNINGHAM, HUNT, ESCHELMAN, Ranney, Haines, Robinson & Robinson.

In equity. Application for writ of assistance.

Mr. Russell and Mr. Burton for compl't; Col. Duffield for Hunt & Eschelman.

The application for a writ of assistance was referred to me by order of court of date Jan'y 22d, 1883, and the following are my views after hearing counsel.

S. L. WITHEY,
Dist. Judge.

The decree entered Sept., 1882, gave complainant certain land therein described, and, as I understand, gave him the undivided three-fourths of the North fraction of Section twelve, Town. 29 North, of Range 8 East. The title to this piece of land at the time of commencing suit was in defendant Cunningham three-fourths and defendant George A. Robinson one-fourth.

75 Defendants Hunt and Eschelman claimed to own some of the other land embraced in the controversy, and they appealed and gave a supersedeas bond. None of the other defendants appealed.

The suit was begun in March, 1873. Notice of lis pendens was filed in the proper county recorder's office. The latter part of April, 1873, defendant Cunningham and one of his codefendants—not Hunt or Eschelman—united with Geo. A. Robinson (who owned an undivided quarter in this piece of land, which quarter interest was not claimed by complainant and not in controversy) in a lease to Lee R. Sanborn, who entered into possession under the lease and who continues to occupy the land.

This lease made Sanborn the lessee and tenant of Geo. A. Robinson's undivided quarter as well as lessee and tenant of Cunningham's undivided three-quarters. The other defendant who joined in the lease had no interest in the land other than that he might have been in possession in common with Cunningham and Robinson.

In June, 1876, if I remember correctly the date, defendant Hunt, who owned the south half of the section, gave Sanborn a quitclaim deed of the south half. Hunt makes affidavit that he believes the north half, the piece in controversy, to belong to him; that it was by the contract of sale to have been covered by his mortgage from complainant, and he sup-
76 posed it was when he, Hunt, foreclosed and bid in under the mortgage, under which his title to any of the land rests.

Sanborn makes affidavit that since Hunt's deed to him in 1876 he has been in possession of the disputed territory under claim of title from Hunt, viz, under said quitclaim deed of the south half.

CONCLUSION.

In the first place, under such a state of facts, as the deed from Hunt to Sanborn does not describe this piece of land, there is no apparent claim of title from Hunt; it is a naked claim without proof to support such claim.

In the second place it seems obvious to me that Sanborn is in possession of the entire parcel of land in dispute under the lease before mentioned from Cunningham & Robinson.

a. That he holds ¾ths under that lease from defendant Cunningham in whom title was to so much, that decreed to complainant.

b. That Sanborn holds the other ¼ under the lease from Robinson, and that this ¼ interest not being in controversy Sanborn cannot be dispossessed of it by Oliver.

c. But as the ¾ths which the court found complainant Oliver entitled to he is entitled to a writ of assistance to put him in possession in common with whosoever has the right to Robinson's ¼ interest, and this ap-
77 pears to be Sanborn.

Hence, writ of assistance granted, I am of opinion that Hunt and Eschelman's appeal and supersedeas bond do not affect or touch this piece of land or any interest in it.

Sanborn is no party to the suit. Hunt and Eschelman showed cause against a writ of assistance, and it incidentally appeared that Sanborn was in possession under the circumstances stated.

Has he a standing in the proceedings that give him a right to an appeal or to have a stay of proceedings?

Will Judge Baxter give the question sufficient consideration to determine whether Sanborn has a right to an appeal and stay of proceedings?

I have a telegram from Col. Duffield asking for an order staying proceedings ten days till an appeal could be perfected.

I have declined, because it did not seem Sanborn was in a position to appeal.

In great haste.

S. L. WITHEY,
Dist. Judge.

GRAND RAPIDS, *Ap'l* 11, 1883.

78 In the Supreme Court of the United States, October term, 1883.

GARRETT B. HUNT ET AL., APPELLANTS,
vs.
DAVID D. OLIVER. } No. 856.

It is hereby stipulated by the counsel for the respective parties hereto

that the following portions of the return to the order to show cause, &c. entered April 25th, 1883, this day filed, may be omitted by the clerk in the printed copy of such return, and the following substitutions made in lieu thereof, to wit:

Omit all after "as follows, to wit," on the 4th page, and also pp. 5, 6, 7, and so much of page 8 as precedes the words "this mortgage being given," and insert instead:

* * * * * * *

79 "Also, in Township 29 North, Range 8 East, the South fractional half of Section twelve, containing 227.05 acres, more or less, with the saw-mill and other improvements thereon."

* * * * * * *

Omit entire pages 10, 18, 19, & 20, & insert instead:

* * * * * * *

"Frac. Section 12, Town. 29, Range 8 East."

* * * * * * *

Omit entire pages 24, 25, 26, 27, 28, and insert instead:

* * * * * * *

"Entire fractional Sec. 12, Town. 29, North Range 8 East.

* * * * * * *

Leave out entire pages 34, 35, 36, and 39, and insert in lieu of page 39: "Plat copy of which is attached to original petition in this court."

Omit entire pages 70, 71, 72.

(S'g'd) HENRY M. DUFFIELD,
Sol'r & of Counsel for Appellant Hunt.

(S'g'd) NATH'L WILSON,
Of Counsel for Appellees.

(Indorsement on cover:) No. 856. Garrett B. Hunt & Jacob Eschelman, appellants, vs. David D. Oliver. Return to rule to show cause why supersedeas should not issue. Supreme Court U. S. 1883. October Term. Filed 9th October, 1883.

5189——3

118-~~211~~ 211

OFFICE SUPREME COURT U. S.
FILED
OCT 22 1883
JAMES H. McKENNEY, Clerk.

SUPREME COURT

OF THE

UNITED STATES.

DAVID D. OLIVER,
Complainant,
vs.
GARRET B. HUNT, and
JACOB ESCHELMAN,
IMPLEADED, &C.,
Defendants.

APPLICATION FOR WRIT OF SUPERCEDEAS.

BRIEF and POINTS, why the application should not be granted.

---

1. The defendants in the Court below were seven in number, and they were not all jointly interested in all the subject matter in suit. The object of this application is to keep complainant from obtaining pos-

session of a single portion of the land in controversy of only about thirteen acres in area, while the land involved in the main controversy was over twenty thousand acres in extent.

2. Previous to September, 1868, complainant had owned a large quantity of land in Alpena and Alcona counties in Michigan, a part of which he had purchased from Cunningham, Hunt and Eschelman, and a part of which he had derived from other sources. At the time of his purchase from Cunningham, Hunt and Eschelman he had executed, to them a mortgage which included the land just purchased, and about 3,000 acres of other land but which did not include the north half of section twelve in town 29 north, of range 8 east. It did include the south half of that section and the *mill* and *improvements* existing thereon, but the mill and improvements, were the water mill then on said land, this being the only mill on the entire section. The mill which is shown on the plat attached to complainant's petition, and there called "Old Mill" burned down, was not yet erected and was not commenced until the year following the making of this mortgage, and it is not surprisIng that when Oliver began to build a mill which was to cost him about $30,000 he located it on land not included in this mortgage.

3. In November, 1867, Oliver conveyed 1-3 of certain pieces of property to Geo. J Robinson, and formed a partnership with him to carry on the milling business on all the property.

4. In September, 1868, about two years after the execution of this mortgage Oliver conveyed all his land and other property to Cunningham; this was done be-

cause he had got into difficulties with his partner, and turned to Cunningham for assistance.

5. Cunningham at this time had just nominally transferred his interest in the mortgage before spoken of, to Hunt and Eschelman, but the Court held that this transfer did not divest him of the character of a mortgagee, and allow him to escape the responsibility of a mortgagee who takes a conveyance from his mortgagor.

6. Thus, on the 3d of September, Hunt and Eschelman held this mortgage. Cunningham held the legal title to all the land, except the 1-4 conveyed to Robinson—and some of the other defendants held other encumbrances.

7. Hunt and Eschelman proceeded to foreclose, and in due time their mortgage was foreclosed, and Hunt obtained the legal title at Master's Sale, so that when the Bill was filed in this cause Hunt held the legal title to the south half of section 12, under the Master's deed.

Cunningham held the legal title to an undivided 3 4 of the north half (about 13 acres) under the deed from Oliver. Robinson held the legal title to the undivided 1-4, also under deed from Oliver.

The defendants under the partnership agreement between themselves were occupying all the land, or rather the partnership composed of the various defendants were occupying the land. In the division of labor Cunningham and Haines were at Buffalo, Hunt and Eschelman were secret partners, and generally remained at their homes in East Clarence, near Buffalo, N. Y. The Robinsons were at Ossineke, (the mill property on sections 12 was called Ossineke). Ranney was sometimes at one place and sometimes at the other.

Neither Hunt nor Eschelman ever, at any time held the legal title to the land in controversy, (the north half of section 12,) and there never was any claim in any of the proceedings either to foreclose the mortgage, or in this latter bill to have it declared paid; that the said north half of section 12 had been omitted from the mortgage by mistake or fraud.

The decree had in this cause finds that the defendants had formed a partnership, had stripped the lands and had appropriated the proceeds; that those proceeds were sufficient to pay the mortgage, which had been contributed to the partnership as capital, and to pay a number of other claims held by other of the defendants, and to furnish a fund of some $42,000 for which the defendants were jointly liable.

8. All the defendants except Hunt & Eschelman rested content with this decree.

Hunt and Eschelman appealed.

The effect of a reversal of the decree in their favor would be, the court would find:

1st. That the mortgage was not contributed to the partnership, and consequently would not be considered paid; but the foreclosure would stand affirmed and Hunt would be the legal owner of the lands described in the mortgage.

2nd. Hunt and Eschelman would be relieved from personal liability on the money judgment.

9. Inasmuch as Cunningham acquiesced in the decree, the land which was conveyed to him by Oliver, other than that covered by said mortgage would be returned to Oliver; in this list is the north half of section 12, the parcel which is the particular object of these proceedings.

10. Sanborn held by two claims; first, a lease not recorded, and not a part of this record, but referred to in his affidavit; what its contents were are not shown. He says he went into possession about one month after this suit was commenced. Second, a deed from Hunt made about three years after this suit was commenced.

No title which he derived from Hunt can be traced back to any claim that Hunt has made in the proceedings in this cause. The rights of the parties (*pro hac vice*) are as they would be, provided Hunt should prevail in his appeal. And should he prevail he would not be entitled to hold this north half of section 12. If he has any right derived from other sources which he does not claim, the right must be established by other proceedings than these. The mere fact that he has made a quit-claim deed of something he neither owned or claimed to own can not entitle him to extend the protection of his stay bond beyond the questions in litigation in the suit appealed.

ALFRED RUSSELL,
Sol'r for Def't.

C. F. BURTON,
NATHANIEL WILSON,
Of Counsel.

SUPREME COURT U.S.
FILED
OCT 22 1883

118-211

In the Supreme Court of the United States.

GARRETT B. HUNT, ET AL., *Appellants*, impleaded, &c.

vs.

DAVID D. OLIVER, *Appellee.*

No. 856. Appeal from the Circuit Court of the United States for the Eastern District of Michigan.
In Equity.

Brief for Appellant, on Motion for Supersedeas, or other writ, under Paragraph 716, U. S. Revised Statutes.

After the appeal of this cause to this Court was duly perfected, the court below ordered and issued a writ of assistance, to put complainant into possession of an undivided three-quarters interest in a large portion of the lands described in the decree.

Many of them were unoccupied, stump-pine lands, as to which the order was of little consequence. But the order also included a valuable mill property, occupied and operated by one Lee R. Sanborn, who had bought the mill site from appellant, Hunt, and himself erected thereon a valuable steam saw-mill.

No notice of the motion for the writ of assistance was ever served on appellant, Hunt, but Sanborn was notified and unsuccessfully opposed the granting of the motion.

The court not only granted the motion, but directed complainant to be put in possession with "*George J. Robinson, owner of the other undivided one-quarter of said land.*"

Petition of Hunt, p. 7.

From this order Sanborn attempted to appeal, but the court below denied him the right.

Hunt's petition, pp. 9 and 10.

At the October Term, 1882, an application was made, by petition to this Honorable Court in this cause, for a *supersedeas*, or other appropriate remedial writ, under Paragraph 716, U. S. Revised Statutes.

Sanborn also filed his petition for a *mandamus*, commanding the court below to allow his appeal, but it was stated to the court that the object of both petitions was the same, and that if one was granted the other would not be pressed.

On April 25th, 1883, after due consideration, this Honorable Court granted a rule, on appellant Hunt's petition, returnable October 9th, 1883, to show cause why such writ should not be awarded.

The return of the court below is now here.

It sustains every averment in the petition, upon which the order to show cause was granted.

It also brings up copies of the affidavits submitted by Sanborn in opposition to the motion for a writ of assistance which set forth, in detail, the facts more briefly stated in the petition.

Upon this return there can be no question of the right of appellant, Hunt, to relief.

The decree of the court below directed all the defendants below to surrender possession of certain lands therein de-

scribed and including the premises hereinafter particularly mentioned, and decreed that defendants jointly should pay to complainant $41,418.87 and interest.

There is no question made in this case as to the regularity of the appeal, the sufficiency of the supersedeas bond, which is in the penal sum of $60,000, or its filing and approval within the statutory time.

The decree appealed from was entered September 21, 1882, the appeal perfected and supersedeas bond in sum of $60,000 approved and filed October 9th, 1882.

By stipulation the time for filing transcript on appeal, which was very voluminous, was extended and the transcript filed and the cause docketed within the extended time.

April 9th, 1883, the court below, on application of the complainant (who is the appellee) made the order for the writ of assistance, Exhibit A, *without notice to appellants*, but with notice to Lee R. Sanborn, who occupied a part of the premises against which the writ was ordered.

Sanborn had shown cause claiming possession and title under Garrett B. Hunt (the petitioner in this matter) derived since commencement of suit in court below, but Hunt had not appeared.

The writ issued (Exhibit D to Petition of Hunt) and is now being executed by the marshal.

The property which is more particularly described as the north half of section 12, town 29 north, range eight east, is a mill-site with a mill of the value of $10,000 and upwards erected by Sanborn after his purchase of the title from Hunt, one of the appellants and the petitioner herein, and other improvements by Sanborn valued upwards of $3.000.

A single glance at the map shows the necessity of possession of the north half of the section in order to make any practical use of the site.

I can conceive of only two possible theories upon which the writ was ordered to issue, notwithstanding the appeal—

First. Because Hunt, the petitioner and one of the appellants, had conveyed his interest to Sanborn prior to the decree of the court below, but pending the suit.

Second. Because the petitioner, Hunt, under the deed of the masters's sale in the foreclosure suit, only got title to "the south fractional half of section twelve, town 29 north of range eight east, containing two hundred and twenty-seven and five one-hundredths acres, more or less with the said mill and other improvements thereon." This being the description in the mortgage and master's deed thereunder, while the writ issues against the north half of said section.

I

The conveyance by Hunt, petitioner, before the decree, although pending the suit below, did not affect the status of the case after an appeal was allowed and perfect by filing a *supersedeas* bond.

Sanborn, not being a party to the suit, might possibly have no right of appeal. But he was clearly entitled in the court below, to all the protection which his grantor's title could give him.

If no writ of assistance could issue against Hunt, on account of the appeal, none ought to issue against his grantee.

In *ex parte* R. R. Companies, 95, U. S. R., p. 221, a defendant's right to appeal was sustained, although he had assigned his interest before the entry of the decree.

The case at bar is identical in principle, the only apparent difference is that here the defendant appealing has assigned his interest in a part, instead of the whole, of the real property in suit.

On this theory, the order for the writ of assistance was clearly unauthorized.

II.

The transcript on appeal* shows that the petitioner, Hunt, was one of three mortgagees in a mortgage made, in 1866, by David D. Oliver, the complainant and appellee herein, covering about 13,000 acres of pine lands, and including the lands on each side of the mouth of Devil River, in Alpena County, Michigan.

In the mortgage the mill site is described as "The south fractional half of section twelve (etc., as above), containing two hundred and twenty-seven and five-one-hundredths acres, more or less, with the saw-mill and other improvements thereon."

A plat of the premises, Exhibit E, shows that, according to government survey, fractional section twelve was never divided into half or quarter sections and that it contained just $227\frac{05}{100}$ acres;

That the half-section line was never run across said section twelve, and can only be located by reference to the quarter post between sections eleven and twelve;

That the old mill of Oliver, the appellee, was located a few rods *north* of a line run due east from the quarter post between sections eleven and twelve.

*The record on appeal is exceedingly voluminous and not yet printed, neither is it paged. To facilitate a reference to the record on appeal, I have placed reference slips between the pages of the original record.

Hunt, the petitioner, and Jacob Eschleman, his co-apellant, foreclosed this mortgage in the Circuit Court of the United States for the Eastern District of Michigan, in equity, and, after four years' litigation, obtained a decree of foreclosure and sale of the lands described therein, including the *locus in quo* described as in the mortgage.

And Hunt bought the lands in at the master's sale. The master's deed described the *locus* as above, but Hunt went into possession of the whole of the section, and transferred his title and possession to Sanborn, as above stated.

Before the master's sale, Oliver filed the bill in this suit in the court below, and attempted to enjoin the master's sale, which, however, was denied.

His bill claimed that, by reason of a deed from him to Cunningham (a co-mortgagee with Hunt and Eschleman), which, although absolute on its face, he claimed was intended for a mortgage, the three original mortgagees were in possession as mortgagees of a three-fourths interest of the mortgaged premises, and he should be credited with the rents, issues, and profits received by the mortgagees, and allowed to redeem on paying whatever balance, if any, was found due from him.

In this deed to Cunningham, he included a three-fourths interest in "*the entire fractional* section twelve, in town twenty-nine north, range eight east."

His prayer for relief was that this deed be declared to have been given to Cunningham to pay the mortgage to Hunt, Eschleman, and Cunningham, and other mortgages out of the proceeds of the premises conveyed, and when they were satisfied to reconvey to him.

He insisted that Cunningham, whose interest in the mortgage had been assigned to his co-mortgagees before Oliver's

deed to him, was still a mortgagee, in fact, and that his assignment of his interest in the mortgage, was pretended and fraudulent as to Oliver.

All these allegations had before this been set up by answer and cross bill to the foreclosure bill of Hunt and Eschleman to foreclose this very mortgage, and had been denied by the court and a decree granted, and a sale ordered and made to Hunt, as above stated.

The present suit, however, was tried before another judge, who gave complainant a decree in accordance with the prayer of the bill; held the defendants liable jointly *as morgagees in possession* for the rents, issues and profits of the lands, and directed the conveyance by the the defendants of the title of, and the surrender and delivering up of the possession of an undivided three-fourths interest in the premises described in the bill of complainant, including "the undivided three-fourths interest *in the entire fractional section twelve, in town twenty-nine north, of range eight east.*"

On the reference to the master under this decree the petitioner, Hunt, jointly with the other defendants, was held liable for the estimated profits of the steam saw mill of said Oliver, situate on the *north half of said section* twelve, and for rental value of the mill site, on said north half, after the destruction of the mill by fire in 1873 or 1872.

The allowance under this head made a part of the $41,418.00 decree against the defendants. No question as to the alleged omission of the north half of said section twelve from the mortgage was made during the suit or at the hearing, and all through the case parties and court proceeded on theory that it was included in the mortgage and master's sale.

Under this state of facts—and they clearly appear on the

118-244
211

In the Supreme Court of the United States.

GARRETT B. HUNT, ET AL., *Appellants*, impleaded, &c. *vs.* DAVID D. OLIVER, *Appellee.*	No. 1245. Appeal from the Circuit Court of the United States for the Eastern District of Michigan. In Equity.

Points for Appellant Hunt on application for a Writ of Supersedeas or other writ under Par. 716, U. S. Rev. Stats.

The decree of the court below directed all the defendants below to surrender possession of certain lands therein described and including the premises hereinafter particularly mentioned, and decreed that defendants jointly should pay to complainant $41,418.87 and interest.

There is no question made in this case as to the regularity of the appeal, the sufficiency of the supersedeas bond, which is in the penal sum of $60,000, or its filing and approval within the statutory time.

The decree appealed from was entered September 21, 1882, the appeal perfected and supersedeas bond in sum of $60,000 approved and filed October 9, 1882.

By stipulation the time for filing transcript on appeal, which was very voluminous, was extended and the transcript filed and the cause docketed within the extended time.

April 9, 1883, the court below, on application of the complainant (who is the appellee) made the order for the writ of assistance, Exhibit A, *without notice to appellants*, but with notice to Lee R. Sanborn, who occupied a part of the premises against which the writ was ordered.

Sanborn had showed cause claiming possession and title under Garrett B. Hunt (the petitioner in this matter) derived since commencement of suit in court below, but Hunt had not appeared.

The writ issued (Exhibit D) and is now being executed by the marshal.

The property which is more particularly described as the north half of section 12, town 29 north, range eight east, is is a mill-site with a mill of the value of $10,000 and upwards, erected by Sanborn after his purchase of the the title from Hunt, one of the appellants and the petitioner herein, and other improvements by Sanborn valued upwards of $3,000.

I can conceive of only two possible theories upon which the writ was ordered to issue, notwithstanding the appeal—

First. Because Hunt, the petitioner and one of the appellants, had conveyed his interest to Sanborn prior to the decree of the court below, but pending the suit.

Second. Because the petitioner, Hunt, under the deed of the master's sale in the foreclosure suit, only got title to "the south fractional half of section twelve, town 29 north, of range eight east, containing two hundred and twenty-seven and five-one-hundredths acres, more or less, with the said mill and other improvements thereon." This being the description in the mortgage and master's deed thereunder, while the writ issues against the north half of said section.

I.

The conveyance by Hunt, petitioner, before the decree, although pending the suit below, did not affect the status of the case after an appeal was allowed, and perfected by filing a *supersedeas* bond.

Sanborn, not being a party to the suit, might possibly have no right of appeal. But he was clearly entitled in the court below, to all the protection which his grantor's title could give him.

If no writ of assistance could issue against Hunt, on account of the appeal, none ought to issue against his grantee.

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The case at bar is identical in principle, the only apparent difference is that here the defendant appealing has assigned his interest, in a part instead of the whole, of the real property in suit.

On this theory, the order for the writ of assistance was clearly unauthorized.

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The transcript on appeal shows that the petitioner, Hunt, was one of three mortgagees in a mortgage made by David D. Oliver, in 1866, the complainant and appellee herein, covering about 13,000 acres of pine lands, and including the lands on each side of the mouth of Devil River, in Alpena County, Michigan.

In the mortgage the mill site is described as "The south fractional half of section twelve (&c., as above) containing two hundred and twenty-seven and $\frac{05}{100}$ acres, more or less, with the saw-mill and other improvements thereon."

A plat of the premises, Exhibit E, shows that according to government survey fractional section twelve was never divided into half or quarter sections, that it contained just $227\frac{05}{100}$ acres.

That the half section line was never run across said section twelve, and can only be located by reference to the quarter post between sections eleven and twelve.

That the old mill of Oliver, the appellee, was located a few rods *north* of a line run due east from the quarter post between sections eleven and twelve.

Hunt, the petitioner, and Jacob Eschleman, his co-appellant, foreclosed this mortgage in the Circuit Court of the United States for the Eastern District of Michigan, in equity,

and after four years' litigation obtained a decree of foreclosure and sale of the lands described therein, including the *locus in quo* described as in the mortgage.

And Hunt bought the lands in at the master's sale. The master's deed described the *locus* as above, but Hunt went into possession of the whole of the section, and transferred his title and possession to Sanborn, as above stated.

Before the master's sale Oliver filed the bill in this suit in the court below, and attempted to enjoin the master's sale, which, however, was denied.

His bill claimed that by reason of a deed from him to Cunningham, (a co-mortgagee with Hunt and Eschleman) which, although absolute on its face, he claimed was intended for a mortgage, the three original mortgagees were in possession as mortgagees of a three-fourths interest of the mortgaged premises, and he should be credited with the rents, issues, and profits received by the mortgagees, and allowed to redeem on paying whatever balance, if any, was found due from him.

In this deed to Cunningham, he included a three-fourths interest in "*the entire fractional* section twelve, in town twenty-nine north, range eight east."

His prayer for relief, was that this deed be declared to have been given to Cunningham to pay the mortgage to Hunt, Eschleman and Cunningham, and other mortgages out of the proceeds of the premises conveyed, and when they were satisfied to reconvey to him.

He insisted that Cunningham whose interest in the mortgages had been assigned to his co-mortgagees before Oliver's deed to him, was still a mortgagee, in fact, and that his assignment of his interest in the mortgage, was pretended and fraudulent as to Oliver.

All these allegations had before this been set up by way of cross bill to the foreclosure bill of Hunt and Eschleman to foreclose this very mortgage, and had been denied by the court and a decree granted, and a sale ordered and made to Hunt, as above stated.

The present suit, however, was tried before another judge, who gave complainant a decree in accordance with the prayer of the bill; held the defendants liable jointly *as mortgagees in possession* for the rents, issues and profits of the lands, and directed the conveyance by the defendants of the title of, and surrender and delivering up of the possession of an undivided three-fourths interest in the premises described in the bill of complainant, including "the undivided three-fourths interest *in the entire fractional section twelve, in town twenty-nine north, of range eight east.*"

On the reference to the master under this decree the petitioner, Hunt, jointly with the other defendants, was held liable for the estimated profits of the steam saw mill of said Oliver, situate on the *north half of said section* twelve, and for the rental value of the mill site, on said north half, after the destruction of the mill by fire in 1873 or 1872.

The allowance under this head made a part of the $41,418 decree against the defendants. No question as to the alleged omission of the north half of said section twelve from the mortgage was made during the suit or at the hearing, and all through the case parties and court proceeded on the theory that it was included in the mortgage and master's sale.

Under this state of facts—and they clearly appear on the record—the appeal of the petitioner should suspend all action on this decree.

It is immaterial whether petitioner's title under the mortgage foreclosure sale covered the north half of fractional section twelve as well as the south half.

Although we insist it does.

Because it clearly appears that the decree proceeds on the ground that petitioner, with the other defendants, was in possession of and enjoying the rents, issues, ond profits of the entire section, and is charged in the decree with the value thereof.

The sole ground of the decree against the petitioner and his co-appellant Eschleman, is *that they were in possession with*

Cunningham, under Oliver's deed to Cunningham, as mortgagees in possession.

It will not be forgotten that this deed to Cunningham describes the entire section twelve.

It is true defendants deny this, and strenuously contend against the charge, but the writ of assistance must issue on the theory of the decree, not on the allegations of parties not sustained by the decree.

The premises comprise an active lumbering, steam sawmill and business, and the damage to this business will be very great if interrupted at the opening of the business season.

The exigency of the case allowed no time for notice to the other side.

I submit that petitioner should be granted an alternative writ of supersedeas, or a rule to show cause why a peremptory writ should not issue, either of supersedeas or of such appropriate form as to the court shall seem proper.

Goddard vs Ordway, 94 U. S., p. 672, and cases cited. And that in the meantime all proceedings under the writ of assistance be stayed by the order of this honorable court.

HENRY M. DUFFIELD,
Sol'r and of Counsel for Petitioner.

Supreme Court of the United States

NO. 214.

OCTOBER TERM, 1885.

GARRETT B. HUNT AND JACOB ECHLEMAN, *Appellants,*

vs.

DAVID D. OLIVER, *Appellee.*

Appeal from the Circuit Court of the United States for the Eastern District of Michigan, S. Div.

BRIEF FOR APPELLANTS.

HENRY M. DUFFIELD,
Attorney for Appellants.

GEORGE F. EDMUNDS,
Of Counsel.

DETROIT:
JOHN F. BEE & CO., BOOK AND JOB PRINTERS.
1885.

Cunningham, under Oliver's deed to Cunningham, as mortgagees in possession.

It will not be forgotten that this deed to Cunningham describes the entire section twelve.

It is true defendants deny this, and strenuously contend against the charge, but the writ of assistance must issue on the theory of the decree, not on the allegations of parties not sustained by the decree.

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HENRY M. DUFFIELD,
Sol'r and of Counsel for Petitioner.

118-24 L11

Office Supreme Court U. S.
FILED.
MAR 26 1886
JAMES. H. McKENNEY,
CLERK.

Supreme Court of the United States.

NO. 214.

OCTOBER TERM, 1885.

GARRETT B. HUNT AND JACOB ESCHLEMAN, *Appellants,*

vs.

DAVID D. OLIVER, *Appellee.*

Appeal from the Circuit Court of the United States for the Eastern District of Michigan. In Equity.

BRIEF FOR APPELLANTS.

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GEORGE F. EDMUNDS,
Of Counsel.

DETROIT:
JOHN F. EBY & CO., BOOK AND JOB PRINTERS.
1886.

Supreme Court of the United States.

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STATEMENT OF CASE.

This is a bill to redeem a mortgage and for other relief, based upon the following facts:

David D. Oliver, the complainant and appellee, in 1866 purchased of the appellants and one Cunningham, who were joint owners, about 6,000 acres of pine lands, including a mill site.

NOTE.—To facilitate reference to the Record in considering this Brief, the following explanation of the order in which the clerk has sent up the Record is given

Volume 1 is the Record in the present case.

Volume 2 is the Record in the foreclosure case.

In volume 1 between pages 1 and 213 are all the pleadings, motions and proceedings, including the final decree. Between pages 213 and 635 is the evidence upon the main issue or merits of the case. Between pages 635 and 1097 is the testimony under the reference to the master. From page 1097 to the end of the volume are the exhibits.

In volume 2 between pages 1145 (which is the first page of volume 2) and 1180 are the pleadings, etc., in the foreclosure suit, including the final decree. The opinion of Judge Longyear on granting the decree of foreclosure is not indexed, but begins on page 1170. Between pages 1180 and 1238 are the pleadings, etc., under the two cross-bills. Between pages 1238 and 1579 is the testimony in the case, and from page 1579 to the end of the volume are the exhibits.

The schedules which follow the foreclosure bill (pp. 1153 to 1159) are schedules to Oliver's answer to the foreclosure bill, which is printed as an addition to the Record.

He paid no part of the purchase money, but secured its payment by a mortgage on the lands purchased and on other pine lands owned by him. In 1867 he erected a steam saw-mill and other improvements on the mortgaged lands, and conducted the business of manufacturing pine lumber from and on these lands, at first alone, afterwards with one Hawkins, and afterwards with one George J. Robinson, with whom he had formed a partnership, and to whom he conveyed a quarter interest in all his lands. In the summer of 1868 he had become financially embarrassed and at variance with his partner Robinson, whom he accused of trying to dispossess him and defraud him. The interest on the Hunt, Eschleman and Cunningham mortgage was past due and unpaid, and he was also in default upon other mortgages made by him to Calvin Haines and Phillip M. Ranney, and to E. & G. R. Haines, covering a part of the lands included in the Hunt, Eschleman and Cunningham mortgage.

In this predicament he applied to Hunt and Cunningham by letter for assistance, stating his situation and desiring them to take a quit-claim from him of all his property; to purchase the C. Haines & Co. mortgage and the E. & G. R. Haines mortgage and other indebtedness outstanding against him; they to quit-claim back the property to him when everything was paid for, and to be paid reasonably for their trouble. (Record, pp. 22, 24, 25.)

Hunt and Eschleman were farmers, and never had been engaged in the lumber business, or in buying and selling lands. Cunningham was, however, acquainted with commercial affairs. Hunt was Cunningham's father-in-law.

Hunt and Cunningham did not accept the proposition, and matters remained in *statu quo* until September, 1868. Oliver meantime personally visited Buffalo and saw Hunt, Eschleman and Cunningham, and urged them to help him out of his troubles with his partner Robinson and his creditors,

which were growing worse and worse. Oliver had given C. Haines & Co. an option to purchase his property, and they had declined to buy.

September 2d, 1868, Cunningham, in response to Oliver's urgent entreaties, left Buffalo, New York, and went to Ossineke and met Oliver there.

At Oliver's own solicitation, Cunningham accepted from Oliver quit-claim deeds of all his real property, and bills of sale of all his personal property, including his interest in the firm of Oliver & Robinson.

Cunningham had, before leaving, assigned his interest in the Hunt, Eschleman and Cunningham mortgage to Hunt and Eschleman.

The purpose of Oliver's transfers to Cunningham, as stated by the latter, was to hold the title for Oliver so that it should not be attached or levied upon in some suits which were pending against Oliver, and to enable Oliver to make a sale thereof. (Record, pp. 558 and 559.) These deeds were dated and acknowledged as of September 3d, although not, in fact, executed until September 8th, 1868. Cunningham almost immediately returned to Buffalo; Oliver failed to effect a sale, and October 3d, 1868, Cunningham, acting for Oliver, executed an agreement with C. Haines & Co. and Geo. J. Robinson, for the sale of all the personal property and all the real estate of Oliver & Robinson, except such as lay outside towns 28 and 29 north, range eight east. (Record p. 30.)

This agreement, hereafter, for sake of brevity, called "the Buffalo agreement," gave Oliver, through Cunningham, the privilege of avoiding its terms by the payment, within thirty days, of $16,000 to C. Haines and $25,000 to Geo. J. Robinson, in which event Robinson was to deed back his one-fourth interest in the firm of Oliver & Robinson, and to release all claims or liens which his father, Henry M. Robinson, had upon the property.

Oliver read over the agreement after (but about the time of) its execution. In accordance with its terms, on November 12th, 1868, he executed a deed to C. Haines & Co. and Geo. J. Robinson, of some lands omitted in his conveyances to Cunningham, and on January 21st, 1869, he procured his wife's acknowledgment thereto. (Record, pp. 38, 39.) Subsequently, on November 26th, 1868, he wrote asking Cunningham to execute a deed of some of the lands lying outside of towns 28 and 29 north, range eight east, which Oliver had sold (Record, p. 49), and Cunningham did as requested.

In pursuance of the Buffalo agreement, Cunningham deeded to George J. Robinson and Haines & Co. the lands covered by its terms, and transferred to them the title to the personal property.

C. Haines & Co. and George J. Robinson then formed a partnership under the firm name of Robinson, Haines & Ranney, and in the January following Cunningham became a partner with them, under the firm name of Cunningham, Robinson, Haines & Co.

In April, 1869, Hunt and Eschleman filed a bill to foreclose their purchase-money mortgage, making parties defendant Oliver and wife, Cunningham, C. Haines & Co. and George J. Robinson. (Record, vol. 2, p. 1145.)

To this bill Oliver answered fully, setting up the facts above stated. (Addition to printed Record, pp. 1–13.) He also charged that Hunt and Eschleman and Henry M. Robinson, the father of George J. Robinson, had become members of the firm of Cunningham, Robinson, Haines & Ranney, and that Cunningham had come to Ossineke and accepted the conveyances from him in pursuance of a conspiracy and agreement between the Robinsons, Haines, Ranney, Cunningham, Hunt and Eschleman to defraud him; that the deeds to Cunningham were made in trust that Cunningham would take the prop-

erty and assume the interest of Oliver in the partnership of Oliver & Robinson; make the necessary advances from time to time, as needed in the business, and pay off the liabilities of Oliver, together with Cunningham's advances, and when the same were paid would reconvey to Oliver all the undivided half of the lands in towns 28 and 29 north, range eight east, and all lands deeded to him outside of said towns, and also convey an undivided one-fourth interest in the lands in towns 28 and 29 to George W. Hawkins, who had agreed to pay therefor $35,000; and that it was agreed between Oliver and Cunningham that the payment of the $35,000 mortgage of Hunt, Cunningham and Eschleman should be deferred until after all the other debts of Oliver were paid, which agreement was well known to Hunt and Eschleman and assented to by them; that the terms of said trust rested entirely in parol and were never reduced to writing; that the defendant Cunningham, after having obtained said deeds and accepting said trust, began making money for himself out of Oliver's estate, and persuaded Oliver to agree to a sale to Robinson, Haines & Ranney, as above set forth; that said firm, doing business under the firm name of the Ossineke Lumber Company, held by force and fraud all the defendant's interests in the lands and mill property; that H. M. Robinson, Hunt and Eschleman pretended to have no interest in said firm, but that really they have a large interest therein; that he was ignorant of the amount due on the Hunt and Eschleman mortgage, but he believed it to be far less than the amount claimed in their said bill, and alleged that a large portion of said mortgage had been paid from the profits of said new copartnership.

Replication was filed to the answer and issue joined. Cotemporaneously with filing the answer, Oliver filed his cross bill containing the same allegations (Record, vol. 2, p. 1185); making defendants all the persons who are defendants to this bill, except Henry M. Robinson, and praying, among

other things, for an account of the amount due on the Hunt and Eschleman mortgage, and an account of all the property that passed into the possession of Cunningham by virtue of the transfers to him; and also of the rents and profits thereof since said transfers; for leave to redeem on paying what, if anything, might be due on said mortgage which he offered to pay; for a decree of satisfaction of the mortgage and a discharge of the same of record.

To this cross-bill defendants Hunt and Eschleman demurred; the court sustained the demurrer and Oliver filed an amended cross-bill. (Record, p. 1202.)

In it he made substantially the same allegations, but he expressly charged, that the transfers to Cunningham were made specially for the purpose of providing for the payment of the Hunt and Eschleman mortgage, and that the arrangement was made with Cunningham, who he expressly charges, was then and still is the owner of a one-third interest in said mortgage. He also alleges that Hunt and Eschleman knew of, and assented to the Buffalo agreement, "and that the foreclosure (of the Hunt and Eschleman mortgage), was in fraud of said agreement."

He charges that the amount due on said mortgage is far less than the amount stated in said bill, "and that a large portion of the said mortgage has been paid * * from the rents, issues and profits of the property so conveyed and transferred to said Cunningham," * * and he avers, "that whatever balance there may be due and unpaid was by said arrangement with Cunningham * * to be paid in the same manner from the rents, issues and profits of said property." (Record, p. 1210.)

The defendants answered the amended cross-bill at length. Hunt and Eschleman denied all the allegations connecting them with the Cunningham trust, and asserted that they were justly entitled to the whole amount of their mortgage and interest thereon; they denied that they ever received any moneys or profits which ought to be applied on said mort-

gage, except the sum endorsed thereon as interest. (Record, pp. 1213–1217.)

Replications were filed to the defendant's answers. The case was heard on pleadings and proofs, and on December 23d, 1872, the Court granted a decree of foreclosure and sale, fixed the amount due on the mortgage, and dismissed the cross bill. (Record, pp. 1180, 1181.) From this decree there was no appeal, and it became final.

Before the sale under said decree was made the present bill was filed, and a motion for an injunction staying the sale under the decree in the foreclosure case and for a receiver, grounded on voluminous affidavits, was made (Original Record, p. 57). It came on to be heard before the judge who tried the foreclosure case, and was denied (Original Record, p. 2621). The lands were then bid in by Hunt at the foreclosure sale. The sale was confirmed and a deed executed in pursuance thereof. (Record, p. 1185.)

Under the Michigan Statutes this deed forever barred Oliver from all claims growing out of the mortgaged lands. "Such deeds (on foreclosure decree) "shall be valid as if "executed by the mortgagor and mortgagee, and shall be "an entire bar against each of them, and against all parties "to the suit in which the decree for such sale was made, "and against their heirs respectively, and all persons claim-"ing under such heirs."

Howell's Annotated (Mich.) Statutes, vol. 2, § 6708.

The mill was destroyed by fire in November, 1872.

To the bill of complaint in the case at bar the appellants, Hunt and Eschleman, filed their joint plea, alleging the foreclosure bill, the pleadings, proceedings and decree under it, and insisting that the adjudication in that suit was a bar to the maintenance of this suit. Complainant filed a replication to the plea, and the same was submitted. Upon the argument thereof the court overruled the plea, but saved to the appellants the benefit of the defense by way of answer. (Record, p. 56.)

In their answer the appellants set up the same defense attempted to be set up by their plea, and insisted that the issue in the foreclosure suit, under the bill of complaint, answer and cross-bill, and the proofs taken therein, was the same, as between the appellants and the complainant, as the issue in this present suit, and that by the said decree in the foreclosure suit the same matters which are in this suit sought to be litigated by complainant against the appellants, were finally and conclusively determined and adjudicated, and that said decree was a bar to the prosecution of this suit against the appellants. (Record, pp. 57, 58, 59.)

Replications to the defendant's answers were filed, full proofs were taken, and the record files and testimony in the foreclosure suit were put in evidence under the order of court, upon a proper motion for that purpose. (Record, pp. 88, 89, 90.)

While this cause was pending, the learned district judge who heard the foreclosure suit, died, and the cause came on to be heard before Judge Withey, of the Western District of Michigan. On the 19th day of April, 1880, he granted a decree in favor of the complainant. (Record, pp. 97–101.)

The opinion filed at the time of rendering the decree is found. (Record, pp. 90–97.)

In this decree such plain error was shown to the judge that he modified the same and entered a new decree. (Record, pp. 102–105.)

In this decree he finds the defendants to be mortgagees in possession, accountable for the rents, profits and proceeds of the property, and directs a reference to a master to state an account.

The appellants complain of this decree, 1st, because the same is a reopening of the litigation settled by the decree in the foreclosure suit; and, 2d, because upon the merits the complainant has not established any right to a decree against them in this cause.

The cause was referred to John J. Speed, Esq., now one of the circuit judges of the State of Michigan, as special master.

His report was filed March 13th, 1882. (Record, pp. 106–197.) It found a balance in favor of complainant as of date of December 31st, 1881, of $12,504.83. To it the complainants filed eight exceptions (Record, pp. 198, 199), and the appellants duly filed ten exceptions. (Record, pp. 200, 201.)

The principal exception filed by the complainant, and which was the only one allowed by the court, related to the quantity of timber cut and removed by the defendants from the lands embraced in the decree.

The master had charged the defendants with all the lumber manufactured and shipped by the defendants from Ossineke, and with the standing pine sold to Merick, Fowler & Lyon.

The court overruled these findings, and charged the defendants with the amounts testified to by men employed by the complainant to go on the lands from which the timber had been cut, to measure the diameter of the stumps and tops, where the tops remained, and the distance from the stumps to the tops.

This examination of the lands was made in the fall of 1880, more than six years after the defendants had ceased cutting the timber from the lands. (Record, p. 743.)

If no top could be found, the length of the stick removed and its diameter at the small end was ascertained by the average length and diameter of trees having the same diameter of stump. (Record, p. 203.)

The result of this finding was to increase the amount charged the defendants for timber cut from the lands, with interest, $28,913.84, against the rights of the appellants. (Record, p. 205.)

The court, at the same time, overruled all the exceptions taken by the defendants to the master's report. (Record, p. 205.)

This ruling sustained the account stated against the defendants in the master's report, in the matters excepted to by the defendants, namely:

1st. Their claim that the amount of logs got out by Oliver & Robinson's jobbers, part of which were on hand and transferred by Oliver to Cunningham, was only 7,000,000 feet instead of 7,800,000 feet. (Record, pp. 200, 111, 112.)

2d. Their claim that they were not chargeable with any amount on account of machinery in the mill. (Record, pp. 200, 116.)

3d. Their claim that they should only have been charged at the rate of 25 cents for each thousand feet of lumber sawed on account of the use of the mill, instead of at the rate of 40 cents per thousand. (Record, pp. 200, 117.)

4th. Their claim that they were not chargeable with any sum for the use of the mill, docks, etc., after the year 1872, when the mill was destroyed. (Record, pp. 200, 117.)

5th. Their claim for the allowance of the debts, amounting to $12,818.94, and which the master finds to have been paid by them on account of Oliver, which are enumerated in the master's report at page 128 of the Record. (Record, p. 200.)

6th. Their claim that the master erroneously charged against them the sum of $21,584.74, being the balance of the "George J. Robinson financial account"—so called. (Record, pp. 201, 131, 132.)

7th. Their claim that the master erroneously charged against them the sum of $6,540.99, being the balance of the "Henry M. Robinson disbursement account"—so called. (Record, pp. 201, 133.)

8th. Their claim for a credit of $1,674.21 and interest, by the allowance of the C. Haines & Co. chattel mortgage debts. (Record, p. 201.)

9th. Their claim for a credit of $2,000 and interest, by

the allowance of the Henry M. Robinson chattel mortgage. (Record, pp. 201 and 130.)

10th. Their claim for a credit of $1,082.75 and interest, by the allowance of the Isador Kauffman debt, and a credit of $1,612.61 and interest, by the allowance of the Oliver & Robinson pay rolls for August, 1868. (Record, pp. 201 and 130.)

The decree entered in pursuance of this ruling increased the balance found by the master against the defendants in the sum of $28,913.84, and ordered them to pay to complainant the sum of $41,418.87 and interest from January 1st, 1882 (Record, p. 206), instead of $12,504.03, found by the master. (Record, p 140.)

The decree further directed the assignment to complainant of the George J. Robinson $20,000 bond and mortgage, the surrender and delivery of possession of all lands transferred by complainant to Cunningham, the execution and delivery to the complainant of deeds therefor, within thirty days, or in default thereof that the decree operate as such deed, and the payment of costs to complainant.

II.

ASSIGNMENT OF ERRORS.

The appellants assign error as follows:

1st. The interlocutory decree (Record, p. 204), and the ruling and decision of the Circuit Court, whereon said decree is based, was erroneous in deciding that the decree in the foreclosure suit brought by the appellants against the complainant herein, under the bill, answer and cross-bill, and upon the proofs therein, did not finally and conclusively determine and adjudicate the same matters which are sought to be litigated in this present suit, and that said decree was not a bar to the prosecution of this suit against the appellants by complainant.

2d. Said interlocutory decree, and the finding and decision of the Circuit Court upon the merits whereon said decree is based was erroneous.

3d. The final decree of the Circuit Court was erroneous in declaring that the foreclosure suit and the decree therein was not a bar in favor of Hunt and Eschleman in this suit, and in failing to decree that it was a bar.

4th. The final decree of the Circuit Court was erroneous in declaring that the transactions appearing in evidence created a trust of any kind as against Hunt and Eschleman.

5th. The final decree of the Circuit Court was erroneous in declaring that Hunt and Eschleman were liable to account or were in any way responsible to Oliver in respect of the transactions appearing in the case, either in their character as mortgagees or otherwise.

6th. The final decree of the Circuit Court was erroneous in finding as a fact that Hunt and Eschleman were parties or accessories in the transactions complained of by Oliver in his dealings with the other parties to these affairs.

7th. The final decree of the Circuit Court was erroneous in that it decreed for the complainant therein, and in not dismissing the bill as against Hunt and Eschleman.

8th. The ruling and decision of the said Circuit Court was erroneous in sustaining the complainant's 2d exception, being that taken to the finding and ruling in the report of John J. Speed, special master, that the defendants had cut from the lands found to belong to complainant only the amount of 18,857,440 feet of lumber, besides that sold to Merick, Fowler & Lyon, and declaring and adjudging the amount thereof to be 29,729,928 feet, for three-fourths of which, instead of three-fourths of said 18,857,440 feet, the defendants are by said ruling of said Circuit Court required to account.

Finding of Special Master, Record, pp. 117-123.
Exception thereto, Record, p. 198.
Decision thereon, Record, pp. 202-205.

9th. The ruling and decision of the said Circuit Court, was erroneous in overruling the exception duly taken by defendants to the finding and ruling in the report of the special master, John J. Speed, that there were 7,800,000 feet of logs on hand September 8th, 1868, transferred by the complainant to Henry S. Cunningham, and with the value of which the said report of said master charged the appellants.

Finding of Special Master, Record, pp. 111-112.
Exception thereto, Record, p. 200.
Decision thereon, Record, p. 202.

10th. The ruling and decision of the said Circuit Court was erroneous in overruling the exception duly taken by defendants to the finding and ruling in the report of the special master, John J. Speed, that the defendants were chargeable with the amount and value of the machinery contained in the mill, in the sum of $3,200, and with three-fourths of the value of which the said report of said master charged the appellants.

Finding of Master, Record, p. 115.
Exception thereto, Record, p. 200.
Decision thereon, Record, p. 202.

11th. The ruling and decision of the said Circuit Court was erroneous in overruling the exception duly taken by defendants to the finding and ruling in the report of the special master, John J. Speed, that the defendants were chargeable with the value of the use of the saw-mill during the years 1869, '70, '71 and '72, at the rate of 40 cents, instead of at the rate of 25 cents, for each thousand feet of lumber sawed by said mill, and with the value of which the said report of said master charged the appellants.

Finding of Master, Record, pp. 116-117.
Exception thereto, Record, p. 200.
Decision thereon, Record, p. 202.

12th. The ruling and decision of the said Circuit Court was erroneous in overruling the exception duly taken by defendants to the finding and ruling in the report of the special master, John J. Speed, that the defendants were chargeable with the value of the use of the mill docks, etc., after the year 1872, at the rate of $500 per annum, with the value of which the said report of the said master charged the appellants.

Finding of Master, Record, p. 117.
Exception thereto, Record, p. 200.
Decision thereon, Record, p. 202.

13th. The ruling and decision of the said Circuit Court was erroneous in overruling the exception duly taken by defendants to the finding and ruling in the report of the special master, John J. Speed, that the defendants were not entitled to credit for the amount of debts of the said complainant, found by the master to have been paid by the defendants, amounting to $12,818.94, and for which no credit was given to said defendants in said report of said master.

Finding of Master, Record, pp. 128, 135.
Exception thereto, Record, p. 200.
Decision thereon, Record, p. 202.

14th. The ruling and decision of the said Circuit Court was erroneous in overruling the exception duly taken by defendants to the finding and ruling in the report of the special master, John J. Speed, that the defendants were chargeable with the balance of the account by said master, in his said report, termed the "George J. Robinson financial account," in the sum of $21,584.74, with the amount of which the said report of said master charged the appellants.

Finding of Master, Record, pp. 131, 132, 133
Exception thereto, Record, p. 200.
Decision thereon, Record, p. 202.

15th. The ruling and decision of the said Circuit Court was erroneous in overruling the exception duly taken by defendants to the finding and ruling in the report of the special master, John J. Speed, that the defendants were chargeable with the balance of the account, by said master, in his said report, termed "the Henry M. Robinson disbursement account," in the sum of $6,540.99 and interest, with the value of which the said report of said master charges the appellants.

Finding of Master, Record, p. 133.
Exception thereto, Record, p. 201.
Decision thereon, p. 202.

16th. The ruling and decision of the said Circuit Court was erroneous in overruling the exception, duly taken by defendants, to the finding and ruling in the report of the special master, John J. Speed, that defendants were not entitled to credit for the amount of the C. Haines & Co. chattel mortgage debts, represented by notes of Oliver and Robinson, amounting to $1,674.21, and for which no credit was given to the said defendant in said report of said master.

Finding of Master, Record, pp. 129, 130.
Exception thereto, Record, p. 201.
Decision thereon, Record, p. 202.

17th. The ruling and decision of the said Circuit Court was erroneous in overruling the exception duly taken by defendants to the finding and ruling in the report of the special master, John J. Speed, that defendants were not entitled to credit for the amount of the Henry M. Robinson chattel mortgage debt due from Oliver & Robinson, amounting to $2,000 and interest, for which no credit was given to the said defendant in said report of said master.

Finding of Master, Record, p. 128.
Exception thereto, Record, p. 201.
Decision thereon, Record, p. 202.

18th. The ruling and decision of the said Circuit Court was erroneous in overruling the exception duly taken by the defendants to the finding and ruling in the report of the special master, John J. Speed, that defendants were not entitled to credit for the amount of the Isadore Kauffman debt due from Oliver & Robinson, admitted to have been paid by the defendants, amounting to $1,082.75, and for which no credit was given to the said defendant in said report of said master.

Finding of Master, Record, p. 130.
Exception thereto, Record, p. 201.
Decision thereon, Record, p. 202.

19th. The ruling and decision of the said Circuit Court was erroneous in overruling the exception duly taken by defendants to the finding and ruling in the report of the special master, John J. Speed, that defendants were not entitled to credit for the amount of the Oliver & Robinson pay-roll for August, 1868, paid by the defendants, and for which no credit was given to the said defendant in said report of said master.

Finding of Master, Record, p. 130.
Exception thereto, Record, p. 201.
Decision thereon, Record, p. 202.

BRIEF.

The appellants insist in their defense to the complainant's bill:

First. That the matters charged therein and alleged against them, and all the questions involved in this suit, so far as they are concerned, have been brought in question, and were within the issue in the foreclosure proceedings, which terminated in a regular and final judgment upon the merits, by a court of competent jurisdiction.

Second. That there is no proof of any fraud, conspiracy or wrong doing upon their part, and they deny the charges thereof, and insist that upon the merits the complainant has made out no case against them.

Under these two propositions the 1st, 2d, 3d, 4th, 5th, 6th and 7th assignments of error will be considered.

First.

Under the first point it may be necessary, in order that the court may comprehend clearly the issues involved in the former suit, to state briefly the contents of the answer and the various bills and cross-bills, which have been filed by the present complainant in this long litigation.

The answer of Oliver to the foreclosure bill (Addition to Record) which was filed by his Honor, the present district judge, who was then Oliver's solicitor, but soon after retired from the case, states with great fullness and particularity the alleged grievances of the complainant.

The gist of this answer, so far as it is necessary to consider it for the purposes of this case, was that Cunningham came to Ossineke two days before the 5th of September, 1868, and represented to Oliver that C. Haines & Co. and E. & G. R. Haines would not complete the agreement for the purchase of said lands which Oliver had with them, but considered their contract at an end. That an arrangement was then made with Cunningham, by which Oliver was to convey to him his interest in all of said lands, *in trust, to further secure the payment of Oliver's debts*, including the mortgage to Hunt, Cunningham and Eschleman, the mortgages to E. & G. R. Haines and C. Haines & Co., a certain mortgage to James B. Wayne, a mortgage on other property to James H. Hill, and some unsecured debts of Oliver's amounting to about $6,000. That Cunningham agreed with Oliver, that in case he would make such conveyance to him of said lands and other lands to the amount of six thousand acres,

together with his personal property and his interest in the partnership of Oliver & Robinson, that he would take such property and assume the place and interest of Oliver in the partnership. That he would make the necessary advances of money from time to time as the same was needed in his business, convert all personal property into money speedily, and would aid and assist, with his own means, in getting out logs for the next summer; would manage the affairs of such partnership with care, prudence and economy, and pay off all the liabilities of Oliver, together with the advances made by him (Cunningham), and when the same were paid would convey back to Oliver an undivided one-half of said lands in towns 28 and 29 north, of range 8 east, and all the lands deeded to him outside of said towns, and also convey an undivided one-fourth of all of said lands in towns 28 and 29 to George W. Hawkins, a brother-in-law of Oliver, for the agreed price of $35,000; that Hawkins was to have the management of the business, under an irrevocable authority from Cunningham, and to have the proceeds of said quarter interest for his services, and that it was agreed by and between Oliver and Cunningham that the payment of the thirty-five thousand dollar mortgage should be deferred until after the other debts of Oliver were paid; that such agreement was well known to Hunt and Eschleman, and assented to by them, and that at that time Oliver had no knowledge of the transfer of Cunningham's interest in said mortgage.

That in pursuance of such understanding, Oliver made to Cunningham conveyances of the property hereinbefore mentioned, which were without consideration other than the existence of the debts assumed, and the above stated agreement of Cunningham; that the said conveyances were all in trust for the purposes hereinbefore mentioned, and for no other purpose whatever; that the terms of said trust were not reduced to writing, but rested in parol agreement only. (Oliver's answer to the foreclosure bill printed in the addition to the Record, pp. 7 to 11.)

The answer then charges that Cunningham commenced making money for himself out of the estate, to Oliver's injury; and endeavored, by false representations, to obtain Oliver's assent to a sale of the property at a sacrifice; and that soon afterwards Cunningham telegraphed to Oliver to meet him at Buffalo, and Oliver went there on the 1st of October, 1868. *That Oliver then met Cunningham, who pretended that he would be unable to execute said trust, and said he would have nothing to do with it, advised Oliver to let him sell his interest in said property to George Robinson, Calvin Haines and Phillip M. Ranney, who he said would purchase the same from him;* and requested Oliver to agree to let him make a sale of the property to said proposed purchasers; that Oliver then gave his verbal assent to the contract, dated the 3d day of October, 1868, between Cunningham, and Robinson, Haines & Ranney, for the purchase of said property; but did not remain till the same was reduced to writing, nor see the same for some time afterwards.

That upon an examination of the said contract he found it was not drawn in accordance with the terms named and agreed to by him; but that, although not so drawn, it did state that Robinson, Haines & Ranney were to cancel and deliver up to Oliver or Cunningham for Oliver's benefit, the mortgage and other obligations made to them by Oliver and Hawkins; that they would pay James B. Wayne, of Detroit, about eleven thousand dollars ($11,000) for Oliver; James H. Hill, of Ossineke, about three thousand dollars, and especially that they would provide for the Hunt and Eschleman mortgage, and would free Oliver from all obligations connected therewith; would release him from all liabilities of the firm of Oliver & Robinson, and also pay E. & G. R. Haines one-half of the amount due on the mortgage to them. That at about the expiration of the thirty days named in said agreement, Cunningham conveyed the

property to Robinson, Haines & Ranney, without the payment of one dollar to Oliver, or for his benefit, and that under and by virtue of said sale a co-partnership between G. J. Robinson, Calvin Haines and Phillip M. Ranney was formed under the name of Robinson, Haines & Co.

That some time in the month of January in the succeeding year (1869) a new partnership was formed between the same parties and Henry S. Cunningham, under the firm name of Cunningham, Robinson, Haines & Co. And that some time during the spring of 1869, Henry M. Robinson, Garrett B. Hunt and Jacob Eschleman were taken into said firm, which was carrying on business and holding possession of Oliver's property under the name of the Ossineke Lumber Co.

The answer then charges a conspiracy and agreement between the defendants in this case to swindle and defraud Oliver, and alleges:

1st. That for that purpose Cunningham obtained the conveyance aforesaid and fraudulently conveyed the property in towns twenty-eight and twenty-nine without regard to Oliver's rights; that he did not put Hawkins in charge of said business, and made no effort to pay off the said encumbrances or claims.

2d. That Haines and Ranney, before making the agreement with Cunningham, assigned the mortgages made by Oliver and by Hawkins to Hunt and Eschleman, without consideration.

3d. That Henry M. Robinson bought the mortgage of Wayne, against Oliver, and commenced suit in the Circuit Court for the county of Wayne for the recovery of twenty thousand dollars thereon.

4th. That Cunningham assigned to Hunt and Eschleman, without consideration, his interest in the Oliver mortgage.

5th. That Hunt and Eschleman accepted the assignment of said mortgages and obligations from Cunningham and from Haines and Ranney, and filed the bill to foreclose their mortgage and for a sale of the mortgaged premises.

6th. That said conspiracy to defraud was entered into about the twenty-fifth of July, 1868.

7th. That none of the promises or writings of the complainants and defendants in that suit, or of either of them, since the above date, have been regarded or fulfilled, or were intended to be; but were made to deceive Oliver and to induce him to make the transfer.

8th. That Henry M. Robinson and Hunt and Eschleman really have a large interest in the lands and business obtained from Oliver through this conveyance, although they pretend to have none.

9th. That he is ignorant of the amount due upon the Hunt and Eschleman mortgage, but believes it to be less than stated in the bill, and charges that a large portion of the mortgage has been paid from the profits of the Hunt and Eschleman co-partnership.

In connection with this answer Oliver filed a cross-bill containing substantially the same averments, and praying that the conveyances and transfers made by Oliver to Cunningham may be declared a mortgage. That an account may be taken of the amount already due upon the mortgages to Cunningham, Hunt and Eschleman, and the mortgage to Haines and Ranney, and an account of the amount due upon all the conveyances and transfers in the bill prayed to be declared mortgages. That an account may be also taken of all the property that passed into the possession of Cunningham by the aforesaid transfers and of the rents and profits accruing since said transfers. That Oliver may be at liberty to redeem the mortgaged premises upon the payment of whatever shall be found due upon the

mortgage to Cunningham, which he offers to pay; for an injunction and a receiver, and for other and further relief. To this bill the appellants demurred, and their demurrer was sustained by the court.

Oliver then filed an amended cross-bill, which differs from the one just analyzed in no particular regarding the alleged Cunningham trust save that it states that the purpose of creating the same was to provide for the payment of the above mentioned debts of Oliver, and especially the Hunt and Eschleman mortgage.

The allegations concerning Cunningham's acting under said trust and the making of the so-called Buffalo agreement are identical with those in the former bill, and all the subsequent averments in the former bill are retained, with the addition also, of the averments that the Ossineke Lumber Company was committing waste upon the land, that Oliver has filed his bill for appropriate relief in the proper state court, and that a large portion of said mortgage has been paid from the profits of the new co-partnership and from the rents, issues and profits of the property conveyed to Cunningham. That whatever balance there may be due and unpaid on the Hunt and Eschleman mortgage was, by the said arrangement of Cunningham, and afterwards with Robinson, Haines & Ranney, agreed to be paid in the same manner from the rents, issues and profits of the property.

It also contains an offer to pay whatever sum may be found to be remaining due upon said mortgage deed, and insists that as between them and Oliver, Cunningham, Robinson, Haines and Ranney ought to pay the same, and therefore asks for a receiver, and that Hunt, Eschleman and Cunningham should be decreed to acknowledge satisfaction of the mortgage and to discharge the same of record.

The prayer of the bill was somewhat changed, so as to read as follows: That the conveyances and transfers by Oliver to Cunningham, and by Cunningham to Robinson, Haines &

Ranney, may be declared to have been made to enable the grantees to pay the mortgage debt among others. That Cunningham's assignment of his interest in the mortgage to Hunt and Eschleman may be declared to have been without consideration and void, and that he, Cunningham, may be adjudged to have ever retained his original interest in said mortgage. For an accounting of the amount due to Hunt and Eschleman and Cunningham, and also of all the property conveyed and transferred to Cunningham, Robinson, Haines & Ranney, and of the rents, issues and profits thereof since the date of said conveyance; and that Cunningham, Robinson, Haines and Ranney be decreed to pay whatever is found to be due and not paid on said mortgage debt as between them and Oliver. For a receiver and an injunction, and that Hunt and Eschleman be decreed to acknowledge satisfaction of the mortgage and to discharge the same from record.

We have set out the answer and cross-bills at perhaps unnecessary length, to give to the court an accurate history of the litigation, and we call especial attention to the fact that neither of these bills charged Hunt and Eschleman with being in any sense the originators or promoters of any arrangement or scheme to injure the complainant.

Neither bill charges that, by reason of their relation as mortgagees, they obtained any unfair advantage over, or were guilty of any oppression of complainant. In the answer and in the first cross-bill the gravamen of the complaint is against the Robinsons and their alleged misdeeds. In the second cross-bill he specifically claims that the transfer to Cunningham, and by him to Robinson, Haines & Ranney, were made to enable the grantees to pay the mortgage debt, among others, and that Cunningham's assignment of his interest on the Hunt and Eschleman mortgage was merely a pretended assignment.

Up to this time, March, 1873, no claim had been made by Oliver, based upon his proposition of June 9, 1868, to Hunt

and Cunningham. (Record, p. 23.) But in his answer and each of his former bills he had sworn that the arrangement was made with Cunningham in September, 1868, in terms excluding the inference that it had any connection whatever with the proposition of June 9, 1868. (Record, vol. 2, pp. 1194 and 1204.)

The bill in the present case (Record, p. 10), after averring the indebtedness of Oliver as stated in the other bills, the location and description of the property, and the prosecution of the manufacture of lumber thereon by Oliver and Hawkins, and subsequently by Oliver with George J. Robinson, alleges that in June, 1868, Oliver applied to Hunt and Cunningham to obtain assistance in his matters, and made to them a proposition in writing, a copy of which is annexed to the bill (Record, p. 23), which was in effect to quit-claim to them all his right, title, interest and claim in all the property he had at Ossineke, of every kind, with the understanding that he should have George Hawkins and R. E. Gallup appointed as receivers, to manage the property, at a salary of twelve hundred dollars per annum, each, until the amount of ninety thousand dollars should be paid; that they should buy all of the mortgages upon said lands, and that when the property was all paid up they should quit-claim back to Oliver the same lands and property he deeded to them, and he would leave it to them to say, as men, what he should pay them, and if left to him "he hopes he shall act like a man in the matter."

That the said mortgagees having thus become acquainted with the full details of his pecuniary difficulties and his disagreements with the Robinsons, formed the design of securing the mortgaged premises and Oliver's other property by pretending to be his friends, while in reality carrying out their fraudulent design, and operating with the other defendants for that purpose. And as the first step in carrying out such design, the said mortgagees took legal counsel, and Cunning-

ham pretended to execute an assignment of his interest in the mortgage to Hunt and Eschleman.

That the said assignment was a mere form, and not a real transaction.

That on the evening of the day of said assignment Cunningham started for Ossineke and received from Oliver the deeds of conveyance and transfer before mentioned. That in taking these deeds Cunningham acted really as the mortgagee and creditor with reference to his interest in the matter, and also on behalf of his co-mortgagees with their assent and authority. That there were no writings expressing the object of the transfers to Cunningham, and Oliver insists "*that it was the creation of the trust substantially like that "proposed to Hunt and Cunningham, and so testified in a "suit brought by Hunt and Eschleman to foreclose their "mortgage; but that said Cunningham claimed in that suit "that he took the transfer for the purpose of effecting a sale "of the property, and the court substantially so found in "said cause, and complainant therefore alleges that such "was the case.*"

It further charges that Cunningham formed a plan to make a sale, nominally, to Robinson, Haines & Ranney, to which complainant consented. That complainant consented that Cunningham might execute an agreement with Robinson, Haines & Ranney as follows, to wit: The plaintiff to have thirty days to sell the property to other parties if he could; if not, then they to buy themselves, and to pay or secure to be paid, canceled and delivered up, the Cunningham, Hunt and Eschleman mortgage and the other mortgages before mentioned, and to release Hawkins from his liabilities, and to pay all the claims against the firm of Robinson & Oliver, upon doing which Cunningham was to deed to Robinson, Haines & Ranney all the lands deeded to him by the complainant and David Preston in towns twenty-eight and twenty-nine north, of range eight east, and

was also to deed to the complainant all of the lands outside of these towns. That the complainant was obliged to leave Buffalo before the agreement was reduced to writing, and in his absence and without his consent Cunningham executed and delivered the agreement of October 3d, 1868, which complainant avers did not provide for the payment of complainant's debts with complainant's property, and complainant's release, which was the verbal contract and agreement assented to by him. That Cunningham subsequently, and without complainant's consent or authority, conveyed all of said property to Robinson, Haines & Ranney, and dated the deed back to October 3d, 1868.

That soon after receiving the deeds the grantees formed a co-partnership for the manufacture of lumber, and in January, Cunningham, acting secretly for himself and Hunt and Eschleman, openly appeared as the senior and principal member of the concern. That Geo. J. Robinson represented his father as well as himself in the said partnership, and that the said defendants were stripping the land of its best pine timber and are still continuing so to do. *That said Hunt and Eschleman mortgage has in reality been paid both in principal and interest by the issues and profits of said land in the partnership accruing to the first mortgagees through and by the interest of Cunningham therein held for the benefit of himself and Hunt and Eschleman.*

Complainant charges that Cunningham, his trusted agent to sell said property, secretly and fraudulently effected a sale thereof to himself and his co-mortgagees. That the deeds and transfers from the complainant to him should be set aside as procured by fraud. That the Buffalo agreement of October 3d, 1868, was fraudulently entered into by Cunningham for the benefit of himself and co-mortgagees, and did not embody complainant's agreement, and should be set aside.

That Cunningham's deed to Robinson, Haines & Ranney was procured by fraud, and should be set aside.

That the mortgage to Hunt and Eschleman has been paid out of the property as aforesaid, and the mortgage debt should be charged with the receipts of said property, to wit: the profits of said co-partnership accruing to Cunningham for the benefit of said mortgagees.

And thereupon the bill prays that the deeds executed by the complainant to Cunningham may be set aside and declared null and void; that Hunt and Eschleman may be enjoined by a preliminary and final and perpetual injunction from the sale of said mortgaged property; that the defendants may be enjoined from carrying on their lumber operations and cutting the pine timber, etc., for a receiver, and for an account:

a. Of what, if anything, is due to the first mortgagees.

b. Of the moneys paid by said complainant upon said mortgages and the issues and profits of said lands received by said co-partnership of Cunningham, Robinson, Haines & Co., and the share accruing to Cunningham for the benefit of himself and Hunt and Eschleman.

c. Of the mortgage debt and the amount thereof; and that the assignment of the Cunningham interest in the mortgage may be declared to be fraudulent and void, and that Cunningham may be decreed to have ever retained his equal one-third interest therein.

d. That complainant may redeem said mortgaged premises on the payment of whatever may be found due to Cunningham, Hunt and Eschleman thereon, which he offers to pay.

e. That Hunt and Eschleman may be compelled to acknowledge satisfaction of the mortgage and said decree of foreclosure, and to discharge the same from record.

f. That all the defendants may be decreed to give possession of the premises to the complainant; for an answer without oath, and for an injunction and subpœna.

It will be seen that the decree in the foreclosure case of necessity decided the following facts:

First. That the assignment of Cunningham's interest in the mortgage to Hunt and Eschleman was made before the transfer or conveyance by Oliver to Cunningham.

Decision of Longyear, J., in foreclosure suit, Record, vol. 2, pp. 1170 and 1173.

It must have been so decided, or else the foreclosure bill would have failed for want of proper parties complainant.

Second. That Hunt and Eschleman were not in any way privy to or connected with the transactions between Oliver and Cunningham, or any of the transactions as to the so-called Cunningham trust.

Decision of Longyear, J., in foreclosure suit, Record, vol. 2, pp. 1170 and 1175.

Third. That the court, if it did not actually decide in the foreclosure suit that the trust alleged against Cunningham was void, did hold expressly that all prior transactions were superseded by and merged in the Buffalo agreement.

Decision of Longyear, J., in foreclosure suit, Record, vol. 2, pp. 1170 and 1176.

And moreover that the agreement should stand as written, and that it was not in anywise changed.

Decision of Longyear, J., in foreclosure suit, Record, vol. 2, pp. 1170 and 1177.

Fourth. That neither by the terms of the Buffalo agreement, nor from the circumstances attending the transactions, could the conveyance and transfer from Oliver to Cunningham, and from him to Robinson, Haines & Ranney, be

charged to have been made to enable the grantees to pay the mortgage debt and procure a discharge of the mortgage in question.

Decision of Longyear, J., in foreclosure suit, Record, vol. 2, pp. 1170 and 1180.

The theory of the bill plainly is that the complainant is a mortgagor out of possession, and that the defendants, Hunt and Eschleman and Cunningham, are mortgagees in possession, either personally or through their privies. That, therefore, complainant is entitled to redeem on paying what, if anything, may be due over and above the share of the profits the mortgagees have received from the mortgaged premises, and complainant asks that the sale be enjoined, not upon any new ground of relief arising subsequent to the decree in the foreclosure suit, not upon any newly discovered evidence, even, but upon the same facts that were set up by way of defense in the answer and cross-bill in the foreclosure suit.

In Michigan a mortgagee of lands has no right of entry, even after default, until after a foreclosure and sale, and the expiration of the statutory period of redemption.

"No action of ejectment shall hereafter be maintained by "a mortgagee, or his assigns or representatives, for the "recovery of the mortgaged premises, until the title thereto "shall have become absolute upon a foreclosure of the mort-"gage."

Howell's Annotated (Mich.) Statutes, vol. 2, § 7847.

Until foreclosure and sale, the title to the premises and the right of the possession remains in the mortgagor.

Dougherty vs. Randall, 3 Mich. R., p. 581.
Baker vs. Pierson, 5 Mich. R., p. 456.
La Due vs. D. & M. Ry Co., 13 Mich. R., p. 380.
Wagar vs. Stone, 36 Mich. R., p. 364.

A mortgagee cannot take or hold possession before foreclosure, without the consent of the mortgagor.

Reading vs. Waterman, 46 Mich. R., p. 107.

Nor will Equity appoint a receiver to take possession of the premises and receive the rents and profits, notwithstanding it be stipulated in the mortgage that such appointment may be made.

Hazeltine vs. Granger, 44 Mich. R., p. 505.

No sale under a foreclosure in chancery can be made within one year after the filing of the bill of foreclosure. "Whenever a bill shall be filed for the foreclosure of a "mortgage, the court shall have the power to decree a sale "of the mortgaged premises, * * * but the circuit "judge shall not, by such decree, order any lands to be sold "within one year after the filing of the bill of foreclosure."

Howell's, etc., Sts., vol. 2, § 6701.

If foreclosed by advertisement, then "if the mortgagor "* * * shall, within one year from the time of such "sale, redeem the premises sold by paying to the purchaser "* * * the sum which was bid therefor, with interest, "* * * then such deed (of sale) shall be void and of no "effect."

Howell's, etc., Sts., vol. 2, § 8507.

The decree in the foreclosure suit (Record, vol. 2, pp. 1180–1184) expressly provided that the defendants be forever barred of and from all equity of redemption and claim in and to said premises and every part and parcel of them. It hardly seems to require argument to show that the decree in the foreclosure suit is conclusive so far as respects Hunt and Eschleman in this suit:

a, that the assignment of Cunningham's interest in said mortgage was before he met Oliver at Ossineke, and the transfers and conveyances there;

b, that Hunt and Eschleman were not in any way privy to or connected with any of the transactions of the so-called Cunningham trust;

c, that the transactions prior to the Buffalo agreement were superseded and merged in that agreement;

d, that said agreement was made as written, and not in any way changed or altered;

e, that neither by the terms of said agreement, nor from the circumstances surrounding the parties and attending the transactions of the conveyance and transfer from Oliver to Cunningham, and by him to Robinson, Haines and Ranney, does it appear that they were made to enable the grantees to pay the mortgage debt and procure a discharge of the mortgage in question.

It follows, that so much of relief prayed for as asks:

First, for an annullment of the Buffalo agreement;

Second, for an injunction upon Hunt and Eschleman from selling under the decree;

Third, for a settlement of the amount that is due to said mortgagees;

Fourth, for an accounting of the amount of profits received by Cunningham for the benefit of himself and Hunt and Eschleman;

Fifth, that the mortgage debt be charged thereby;

Sixth, that the assignment of Cunningham's interest in the Hunt and Eschleman mortgage be declared void;

Seventh, that the complainant may redeem said mortgage on paying what, if anything, is due Cunningham, Hunt and Eschleman;

Eighth, that Cunningham, Hunt and Eschleman be com-

pelled to acknowledge satisfaction of the mortgage and decreed to discharge the same from record, must be denied in this suit.

What, then, is left in litigation undecided as respects Hunt and Eschleman?

Can there be a question but that the foreclosure decree is a full and final bar to the complainant's claim in this suit?

A judgment upon a point in issue by a court of competent jurisdiction is, between the same parties or their privies, conclusive, whether as a plea in bar or as evidence, upon the same matter directly in issue in another suit, and this, although the objects of the suits are different.

Cowen & Hill's notes, to Phillips on Evidence, pp. 828 and 962.
2 Parsons on Contracts, p. 728, and cases cited.

From among the numerous cases sustaining this position, we select the following:

Birckhead vs. Brown, 5 Sandford's R., p. 134.
Beall vs. Pearre, 12 Maryland R., p. 550.
Watts vs. Lyon, 2 Mich. R., p. 275.
McGraw vs. Pettibone, 10 Mich. R., p. 530.
Rankin vs. Goddard, 55 Me. R., p. 389.
Walker vs. Chase, 53 Me. R., p. 258.
Sawyer vs. Woodbury, 7 Gray's R., p. 499.
Jenison vs. Springfield, 13 Gray's R., p. 544.
Davis vs. Tallcot, 2 Kern. (12 N. Y.) R., p. 184.
Doty vs. Brown, 4 Comst. (4 N. Y.) R., p. 71.
Castle vs. Noyes, 4 Kern. (14 N. Y.) R., p. 329.
White vs. Coatsworth, 2 Seld. (6 N. Y.) R., p. 137.
Smith vs. Kelly, 2 Hall's R., pp. 217, 224, 225.

Bellinger vs. Craigue, 31 Barb. R., p. 534.
Parrish vs. Ferris, 2 Black's (U. S.) R., p. 606.
Demorest vs. Dare, 32 N. Y. R., p. 281.
Williams vs. Fitzhugh, 44 Barb. R., p. 321.
Betts vs. Starr, 5 Conn. R., p. 550.

A verdict and judgment of a court of record, or a decree in chancery, although not binding on strangers, puts an end to all further controversy concerning the points thus decided between the parties to such suit.

In this there is and ought to be no difference between a verdict and judgment in a court of common law and a decree of a court of equity.

Hopkins vs. Lee, 6 Wheat. R., pp. 113, 114.

A fact which has been directly tried and decided by a court of competent jurisdiction cannot be contested again between the same parties in the same or any other court.

Bank of N. S. vs. Beverly, 1 How. R., p. 134.

And it is held that the judgment of a court having jurisdiction is final, not only as to the subject matter actually determined, but as to every other matter which might have been litigated in the cause;

Embury vs. Connor, 3 N. Y. (3 Coms.) R., p. 511, and cases there cited.
Reversing, 2 Sandf. R., p. 98.

and as to all claims and matters which might have been litigated under the pleadings and issues.

Bruen vs. Howe, 2 Barb. R., p. 586.
1 Phil. on Evidence, p. 223.
Voorhees vs. Bank of United States, 10 Peters R., p. 449.
Le Guen vs. Gouverneur, 1 Johns. Cas., p. 436 (2d ed., note A, p. 492.)
Harris vs. Harris, 36 Barb. R., p. 88.
Hayes vs. Reese, id., p. 151.

In Jacobson v. Miller, 41 Mich. R., p. 90, the Supreme Court of Michigan, in an exhaustive and elaborate opinion, have stated the doctrine of *res adjudicata* with admirable clearness, as follows:

"The adjudication is conclusive in respect to,

"1st. The subject matter of the litigation.

"2d. The points of fact or law, or both, necessarily settled in determining the issue on the subject matter.

"The subject matter of a litigation is the right which one party claims as against the other, and on which he demands the judgment of the court.

"Adjudications on the subject matter of a suit are conclusive wherever any question respecting it arises afterwards in a collateral suit, and in any new suit in which the pleadings put any part of that in issue, and this is so whether *an adjudication was obtained on default or whether all possible questions were raised on the trial, or whether it was correct in fact or law.*"

In Cromwell vs. The County of Sac, 94 U. S. R., p. 351, plaintiff had prosecuted a former action for the recovery of certain bonds, and judgment had passed against him on the ground that he was shown not to have purchased them for value before maturity and without notice of defects. But he was allowed to recover in a subsequent action for the value of coupons of other bonds of the same series which he showed he had obtained for value and before maturity.

The court states with clearness the distinction between the effect of a judgment as a bar against the prosecution of a second action *upon the same claim*, and its effect as a bar in another action between the same parties *upon a different claim.*

In the former case the judgment or decree (we use the language of the court) "is a finality as to the claim or demand in controversy concluding parties and those in privity with them, not only as to every matter which was offered and

received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." * * * "If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence." * * * "The language therefore which is so often used, that a judgment estops not only as to every ground of recovery or defense, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy."

The following decisions of this court afford pertinent instances of the application of the doctrine:

In *Corcoran vs. Chesapeake Canal Co.*, 94 U. S. R., p. 741, one of the trustees of a mortgage, who was also the holder of bonds under it, filed a bill to enforce the payment of coupons of interest due and unpaid. The defendants were the State of Maryland, the Chesapeake and Ohio Canal Co., and the complainant's co-trustees in the mortgage securing the payment of the coupons. The main question to be decided was the right of the court to recover interest upon interest coupons. The Canal Company set up a former suit brought by the State of Virginia, to which the parties in this suit and others, representing all the various classes of bondholders, were parties, and in which the claim that the interest coupons bore interest from maturity, and were to be allowed payment out of the revenues of the Canal Company in preference to the claims of the State of Maryland, was presented, argued and decided in opposition to the complainant's claim.

In that suit the State of Virginia claimed interest on the coupons she held, standing in the same relation as those of Corcoran, complainant in this suit. The State of Maryland and the Canal Company denied the right, and Corcoran and his co-trustees submitted all those matters to the Court. The decree in that case was against the right to claim from

the revenues in preference to the claims of the State of Maryland. Held that this former decree was conclusive.

The court, in answer to the objection of Corcoran and his trustees, that as between them no issue was raised by the pleadings on this question, and no adversary proceedings were had, say:

The answer is that in chancery suits where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-defendants may be passed upon and decided, and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded, so far as it affects rights presented to the court and passed upon by the decree.

In *Louis vs. Brown Township*, 109 U. S. R., p. 162, the action was at law to recover the principal and interest due on certain bonds and coupons. Defendants pleaded a former adjudication, in which the bonds were held void. In one plea defendants set up a suit by one Hiram Hipple against the trustees of Brown township, Richard B. Hopple and other parties, in which Hipple claimed that he was the owner of certain real estate, which was encumbered by a mortgage to pay the bonds on which the present suit is brought, and that the defendants, among whom was Richard B. Hopple, from whom plaintiffs in this suit bought the bonds, asserted a claim to his land on account of said mortgage. The plea further alleges that the holders of the bonds, including Hopple, filed their answer and cross-bill, alleging the bonds and mortgage to be valid, and praying that they be so declared, and for a decree of foreclosure and sale. And that in said cross-bill said Richard Hopple set up his ownership of the bonds in this suit as a foundation of his prayer for relief. The plea further alleges that a final decree passed against the bondholders, on the ground of the want of authority in the trustees of Brown town-

ship to issue the bonds, and they were adjudged to pay costs.

A demurrer was filed to the plea, and from the order overruling it the plaintiff appealed. This court held that the decree in the former suit was conclusive. It was argued that the board of trustees and Hopple, both being defendants to Hipple's bill, no adversary contention on the question of the validity of the bonds could have taken place between them. The court say that while this contention overlooks the fact that Hopple filed a cross-bill, making the other trustees defendants, and in this manner directly raised the issue of the validity of the bonds, yet, even if there had been no cross-bill filed, the fact that Hopple and the trustees were both defendants in the suit of Hipple did not impair the conclusiveness of the decree.

Citing Corcoran vs. Ches. & O. C. Co., *ubi sup.*

Bryan vs. Kennett, 113 U. S. R., p. 179, was an action of ejectment for real estate. A decree of a court of equity rendered against the plaintiff, in a former suit in the nature of a bill to quiet title, was held conclusive against his claim of title against the defendants.

In *Lessee of Parrish vs. Ferris*, 2 Black. R., p. 606, an action of ejectment was held not maintainable against defendants, in whose favor in a former suit a bill in the nature of a bill to quiet title had been decided.

The decree here set up in bar of the action was a decree of an appellate court remitting the case to the lower court, *there to be dismissed.*

In *Stockton vs. Ford*, 11 Howard R., p. 232, the plaintiff sought to foreclose an execution lien on lands which, by the laws of Louisiana, was a lien in the nature of a mortgage, and the court found that prior to the plaintiff's acquiring title to the execution lien the same had been assigned to a third person (Jones), whose title the court sustained as prior and superior.

Subsequently, in *Stockton vs. Ford*, 13 How. R., p. 418, the same plaintiff filed a bill to charge the plantation and slaves of the defendant with the same judicial mortgage, under his former claim of title, and also praying that defendant might be decreed to pay the attorney's fees and costs on obtaining the judicial mortgage, which were provided for in the assignment to Jones, and any balance which might be found due after payment to Jones. The court held, as to his claim for fees and costs, that this question was properly involved in the former case, and might have been there raised and determined, and that the neglect of the plaintiff to avail himself of it in the former suit, even if it were tenable, furnishes no reason for another litigation.

The counsel for complainant assume that the appellants base their claim of *res adjudicata* upon the decree dismissing the cross-bill. And they argue that as the cross-bill was dismissed without prejudice, that decree cannot be maintained as a bar to the present suit.

In this they are in error. The appellants plead the decree of foreclosure obtained by them against Oliver in bar of this suit.

The cross-bill was merely auxiliary to and in aid of Oliver's defense to the foreclosure bill.

Story's Equity Pl., §§ 393, 399.

The cross-suit and the main suit constituted but one suit.

Cross vs. De Valle, 1 Wall. R., p. 5.

It is the decree on the issue which was joined, tried and determined in this one suit, comprehending not only the cross-bill but the answer to the foreclosure bill, and the foreclosure bill as its foundation, which is set up in bar of the present suit.

If, under his answer to the foreclosure bill, under which proofs were taken, and the decree of foreclosure

was rendered, Oliver could have maintained his defense, then he is debarred from setting up these facts in this suit. It makes no difference in this respect whether the decision in the foreclosure suit was rightfully made or not.

Freeman on Judgments, 3d edition, § 260.

We submit that the defense claimed in the foreclosure suit was admissible both under the answer and under the cross-bill.

1st. Under the answer as matter of pure defense.

The gist of Oliver's answer was, that by fraud, imposition, and conspiracy, and by taking advantage of their position as mortgagees and his embarrassed financial condition, the appellants, Hunt and Eschleman, through Cunningham, obtained a deed of the mortgaged lands, and bills of sale of all his interest in the Oliver & Robinson partnership, and having obtained these titles, Cunningham, representing them and in collusion with them, went on the lands and shared with Robinson and others the rents and profits thereof, and it alleged that a large portion of the mortgage had been paid from such rents and profits.

That proof of this state of facts was admissible under the answer seems too clear for extended discussion. It went to the very marrow of the foreclosing complainant's claim. If true, then they could only obtain a decree of foreclosure for the amount due upon said mortgage, after crediting Oliver with the rents and profits shown to have been received by them. And if such profits exceeded the amount due on the mortgage, they could not have any decree whatever. Surely the defense that a mortgage is paid in whole, or in part, can be set up by an answer. It is matter of denial and traverse at law. And it is immaterial in what manner the full payment or partial payment was made, whether by set-off, counter claim or otherwise.

Equity Rule 39 expressly provides that "the defendant

"shall be entitled in all cases by answer to insist upon all "matters of defense (not being matters of abatement, or to "the character of the parties or matters of form) in bar of "or to the merits of the bill of which he may be entitled "to avail himself by a plea in bar."

Rules of Practice in Equity.

But whether this rule applies or not the defense is admissible under the general rules of pleading.

In the following cases defenses of like nature to the one in question were admitted under an answer:

In *Vroon vs. Ditmas*, 4 Paige R., p. 526, the defense of usury was allowed to be set up by answer to a foreclosure bill.

In *Chapman vs. Robertson*, 6 Paige R., p. 627, a claim of set-off was allowed under an answer to a foreclosure bill.

In *Fife vs. Clayton*, 13 Ves. R., p. 546, to a bill for specific performance of a contract for a sale of real estate, the defendant by answer alleged a different contract of sale, and offered to submit to a decree to perform the contract as he alleged it. It was objected that the defendant could not have the decree without a cross-bill, but Lord Eldon decided otherwise, and allowed the decree, following a precedent of Lord Erskin in *Scott vs. Stapylton*, 13 Ves. R., p. 425.

In *Hannah vs. Hodson*, 7 Jurist, N. S., p. 1092, a father and mother and children joined in conveying to a purchaser an estate which was settled upon trust for the father and mother successively for life, with remainder to the children equally. The trustees refused to convey the legal estate. A bill filed by the purchasers to compel the trustees and children to convey the outstanding legal title was dismissed, because no part of the consideration was paid to the children, and there were circumstances of fraud on the part of the parents. It was held that the defense was properly set up by answer, and that it was unnecessary to file a cross-bill for the purpose.

In *Morris vs. Islip*, 20 Beav. R., p. 654, a suit was instituted by a mortgagor against a mortgagee in possession, and a decree was made for an account with annual rests. The mortgagor went abroad and abandoned his suit. He afterwards died and the mortgagee commenced suit against the representatives of the mortgagor for foreclosure. Held, that irrespective of the evidence, the decree must be the same as in the other case, viz., for an account with annual rests.

In *Angier vs. Masterson*, 6 Cal. R., p. 6, defendant in a foreclosure suit was allowed under his answer to introduce a written agreement subsequent to the mortgage assigning the rents and profits to the mortgagee until the mortgage was paid, and to give evidence showing the amount of rents and profits so received.

In *Campbell v. Consalus*, 25 N. Y. R., p. 613, complainant brought suit to foreclose a mortgage executed by the defendant. He insisted that the amount due on the mortgage had been conclusively adjudged by the determination of referees to whom an action pending between the defendant and the complainant's assignor had been referred. That action was brought for the purpose of having the mortgage and two judgments which complainant's assignor held against the defendant declared satisfied, on the ground that they had been paid. It was not an action to redeem, and it did not ask for an account, or offer to pay any amount that might be found due. The only issue made by the answer of complainant's assignor was whether the mortgage and judgments were paid. No affirmative relief was asked in his answer. The referees reported that there was $2,754.88 due on the mortgage, and judgment was entered dismissing the bill. Held, that the judgment in that suit was conclusive in the foreclosure suit, that the mortgage was not paid, and that something was due thereon.

In *Ballenger vs. Worley*, 1 Bibb. R., p. 195, a mortgagor

was allowed under his answer in a foreclosure suit to be credited with the rents and profits received by the mortgagee while in possession of the premises.

It is a general rule in equity pleading that where a party to a deed comes into a court of equity to have the deed and the transaction it represents completed, any case of fraud so connected therewith as to operate as a defense against the prayer of the bill may be set up by way of answer, and it is unnecessary for that purpose to file a cross-bill.

Story's Eq. Pl., 8th Ed., §394 a.

2nd. But even upon the theory that a cross-bill was necessary for Oliver to establish the defense, which we deny, and notwithstanding the statement in the decree that the cross-bill is dismissed without prejudice, the decree of foreclosure is a bar to the maintenance of this suit.

The clause in the decree, "but without prejudice," was very properly inserted to prevent any claim by the Robinsons or Haines and Ranney or Cunningham, that as to the transactions between them and Oliver, with which the appellants, Hunt and Eschleman, were in nowise connected, the decree could be claimed to be *res adjudicata*.

This clause, therefore, does not, *ex vi termini*, import any conclusion that the decree is not conclusive as between the appellants and Oliver. This question is to be determined only by a consideration of the legal effect of the decree and its bearing upon the issues presented under it.

On this branch of the case we submit that the defense set up by Oliver in either cross-bill, *if proven*, would have been conclusive in his favor in the foreclosure suit.

It will not be contended that the fact that the demurrer to the first cross-bill was sustained, determines the rights of the parties in this case, unless the decision sustaining the demurrer was correct in law and in equity.

We submit that the first cross-bill would lie, and the decision sustaining the demurrer was erroneous.

The only reasons urged in favor of its correctness were: That it involved other parties and other property than the parties and the property impleaded and involved in the foreclosure suit. While this was true literally, yet substantially it was not the case. The only party against whom Oliver asked any relief in the cross-bill, who was not a party defendant to the foreclosure bill, was Henry M. Robinson. As to him the allegations in the cross-bill clearly showed that the title to all the lands and property in question remained in George J. Robinson, and that he was in direct privity with George J. Robinson. A decree could pass against George J. Robinson. It would be no objection that Henry M. Robinson claimed an interest in the property under him. The legal title still remained, according to the allegations of the cross-bill, in Cunningham and George J. Robinson. They were the only persons with whom Oliver on this point had any concern.

There was no controversy concerning other property than the mortgaged property which was so connected with the complainant's grounds of relief as to be necessarily involved in the cross-bill in a way to prevent the court administering the relief asked in the cross-bill. It is true that Oliver claimed that he had turned over to Cunningham lands not covered by the Hunt and Eschleman mortgage, and that the rents and profits which had been received from these lands should be applied to the reduction of the mortgage debt due Hunt and Eschleman. But this claim is based upon the explicit charge that Cunningham, in taking the transfer of this property, took it for himself and his co-mortgagees, Hunt and Eschleman, both of whom were parties complainants to the foreclosure bill, and against both of whom the decree would fully avail the complainant.

While there was much that was impertinent and imma-

terial in the original cross-bill, there was nothing that prevented or materially barred the granting of relief under it, if the complainant could establish the facts as alleged.

In the amended cross-bill (Record, Vol. 2. p. 1202), the complainant changed the grounds of relief, and based his claim upon the charge that under and in pursuance of an arrangement between Cunningham, Robinson, Haines and Ranney, called the Buffalo agreement, of which Hunt and Eschleman had knowledge, and to which they consented, said Cunningham, Robinson, Haines and Ranney would provide for the Hunt and Eschleman mortgage, and free Oliver from all obligations connected therewith. He prayed that the conveyances made under such arrangement might be declared to have been made to the grantees to enable them to pay the mortgage debt and to discharge the mortgage; for an account of the rents and profits received by the mortgagees which ought to be applied to the payment of the Hunt and Eschleman debt, and for a decree that Cunningham and his grantees should, as between Oliver and them, pay the balance, if any was due, upon said mortgage. But as between himself and Hunt and Eschleman, he offers to pay whatever may be due.

This allegation, the court says, in the opinion given on pronouncing the decree of foreclosure, was the reason for allowing the amendments to the original cross-bill. "But "for this allegation," the court says, "the amended cross-bill "would have been dismissed on demurrer, and as it now "appears to have been untrue, the amended cross-bill can- "not be expected to fare any better."

This brief *résumé* of the two cross-bills shows clearly that if the defense alleged had been proven, it would have been a complete answer to the foreclosure bill, and a decree would have been granted, either dismissing the bill or largely reducing the amount due thereon, and providing that whatever balance was due should be paid by Cunningham, Robinson, Haines and Ranney.

A careful perusal of the opinion of Judge Longyear, on pronouncing the decree of foreclosure,

Record, vol. 2, p. 1170,

cannot fail to convince the court that his reason for dismissing the cross-bill and granting a foreclosure sale, and his sole reason, was not any defect of form or substance in the frame of the cross-bill, but because the evidence under it failed to prove its allegations.

Under this statement of the law and the facts, we are utterly unable to conceive of any possible answer to the claim of the appellants, that the decree rendered in their favor under the foreclosure bill is not *res adjudicata*.

By that decree the complainant in this case was held personally liable for the full amount of the mortgage debt, and was, in express terms, forever barred of every right or claim, in law or in equity, in and to the mortgaged premises. (Record, vol. 2, p. 1182.) The bill in this case is, upon its very face, a bill to redeem the premises from under that (now foreclosed) mortgage.

The arguments of the complainant's counsel, in support of it, rest primarily on the theory that Hunt and Eschleman are mortgagees in possession, and should be charged as against the mortgage debt with the rents issues and profits of the premises.

If, after the decree of foreclosure rendered in favor of Hunt and Eschleman, in a suit so long and stubbornly contested, the complainant may file his bill to redeem the identical mortgage which was the subject matter of that suit, and reduce the debt by rents and profits, we ask, what did that foreclosure decree decide, and what is the value of a foreclosure decree in any case?

Second.

Upon the merits there is no case against the appellants.

The testimony is substantially a repetition of the testimony for the defendant Oliver in the foreclosure suit, with the exception of the testimony of George J. Robinson. He has "gone over to the enemy" for some unknown consideration, and now swears diametrically contrary to his former testimony.

The theory of the present bill is a conspiracy to divest Oliver of his title to all of his property. There is not the slightest direct evidence of any such conspiracy, except the testimony of George J. Robinson, which we will first consider.

In the foreclosure suit, he was what might properly be called, "the managing defendant;" furnished an abstract of the testimony, framed largely his own answer, and wrote part of it in his own hand.

In that answer (Record, vol. 2, p. 1228), which was under oath, he swore that he had no knowledge of the transactions of the Cunningham trust, and he denied that under, or in pursuance of such arrangement, Cunningham became a partner with him in said business, or shared in any way in its liabilities and duties, or participated in its profits; and that the allegations in said amended cross-bill, to that effect, were false and untrue. (Record, vol. 2, pp. 1230 and 1231.) * * * That although he and Haines & Co. did not really want to purchase Oliver's interest, yet, on reflection that its acquisition might enable them to influence the advance of capital necessary to pay for the improvements, they did, on the third of October, 1868, consummate an agreement in writing with Cunningham for the purchase thereof; and he states fully as to the execution thereof, expressly denying Oliver's allegation in the cross-bill.

Record, vol. 2, p. 1231.

He also denied, in said answer, that Cunningham deeded to C. Haines & Co. without the performance of any of the conditions of said agreement, and expressly asserted that all its conditions were to the best of his knowledge performed, and averred his willingness on his own part, and on the part of C. Haines & Co., to perform anything to be done under the agreement.

Record, vol. 2, p. 1231.

He declared that Cunningham never was a partner until January, 1869, *when he purchased an interest in the partnership property* of Robinson, Haines & Ranney, under the name and style of Cunningham, Robinson, Haines & Ranney, which still continues.

And that neither Garrett B. Hunt, Jacob Eschleman, or Henry M. Robinson are or ever were partners at any time.

And he expressly denies all unlawful combination and confederacy, as charged in said cross-bill.

Record, vol. 2. p. 1232.

In his deposition taken under said cross-bill, found in the following enumerated pages of the printed record, he denies *in toto*, Melville's statement as to the scheme of himself and others to exclude Oliver and himself from the business.

Record, vol. 2, p. 1551.

He also denies all knowledge of Cunningham's arrangement with Robinson, and states that Cunningham's question, as to how he would like him for a partner instead of Oliver —which in this case, he seeks to insinuate was a matter between him and Cunningham, clandestine, and without Oliver's knowledge—was made openly in the presence of Oliver, and was Oliver's suggestion.

Record, vol. 2, p, 1551.

He says he first heard of Oliver's sale to Cunningham

when Melville called his attention to the bills of sale in the town clerk's office, and that he became very much alarmed.

Record, vol. 2, p. 1552.

He says he never consented to Cunningham or Oliver to receive Cunningham as a partner in that business in place of Oliver, nor to the trust arrangement which Oliver made with Cunningham.

Record, vol. 2, p. 1553.

That the only thing he did with Hawkins, with relation to Oliver, Cunningham, Eschleman, or anybody else, was to give Hawkins a very curt answer in reply to his question, "Have you any word to send to Hunt."

Record, vol. 2, p. 1554.

That there is not the shadow of truth in the statement that the firm of Cunningham, Robinson, Haines & Ranney is a combination of the parties named in it, and the mortgagees, Hunt and Eschleman, or that he ever so told Melville; and that he knows that the mortgagees, Hunt and Eschleman, are not partners therein, and never have been.

Record, vol. 2, p. 1555.

That the Buffalo agreement was fully known to Oliver, and consented to by him, and parts of it discussed.

Record, vol. 2, pp. 1562–1563.

That after it was signed he expressed his distaste of it to Oliver, and that Oliver wrote his Exhibit "A-6,"

Record, vol. 2, p. 1635,

in that particular regard, referring to his request that Oliver would induce Evans, if possible, to buy the purchasers out.

Record, vol. 2, p. 1563.

That Hunt and Eschleman have never been partners in

any partnership which he had had with Robinson, Haines and Cunningham; and that there were no articles of copartnership of the firm of Robinson, Cunningham, Haines & Co.

Record, vol. 2, p. 1564.

That he first became a partner of Cunningham's on the third of January, 1869.

Record, vol. 2, p. 1569.

That he does not recollect ever seeing Hunt or Eschleman before he met them at Buffalo with Cunningham, at the time of the Buffalo agreement.

Record, vol. 2, p. 1574.

That he does not know what amount Cunningham brought into the business in the way of capital.

Record, vol. 2, p. 1575.

That he cannot say what induced him to come down to Buffalo at the time of the Buffalo agreement with Oliver. He had some talk about coming down, and that he thinks that he went down in the hope that Haines would buy out Oliver, and also because Oliver & Robinson's obligations to Haines were pressing.

Record, vol. 2, p. 1576.

That he never furnished Hawkins with money to go down and try to get the mortgagees to foreclose the mortgages, and that the money that he gave Hawkins was for the purpose of coming down to procure a cook, and on some other business of that kind, for which he accounted to the bookkeeper.

Record, vol. 2, p. 1576–7.

After the agreement and sale under the foreclosure, Robinson became at war with his co-defendants. Their relations became very bitter; they have had litigation;

Record, p. 420–423.

he stole the Buffalo firm's books and papers, together with notes to the amount of forty thousand dollars, and ran away to Canada.

Robinson's testimony, Record, p. 427–8.
Cunningham's testimony, Record, p. 315.
Boynton's testimony, Record, p. 511–12.
See also B. Cartwright's testimony, Record, p. 525–6.

who carried home with Robinson part of the books the night before Robinson stole them. This was of a piece with Robinson's behavior towards Oliver. Oliver & Robinson's books were found some two years after buried in the woodshed of the house occupied by Robinson at the time they were lost.

Record, p. 239.

At the time of the stealing of the Buffalo firm's books, he tore out over forty pages of the firm's letter book; and he took the Brackenridge notes made to the order of Cunningham, and over which he had no control or authority.

Robinson's testimony, Record, p. 451.

In this state of affairs he proposed to Oliver to go in with him against the other parties, saying that he would connect the other parties with their former transactions; and that he wanted to be held harmless himself, and his father also, as a condition of taking hold of the matter.

Testimony of Sanborn, Record, p. 477.

This testimony is strongly denied by Oliver, but afterwards admitted, and special attention is called to his backing and filling on cross-examination,

Record, pp. 395, 396, 398, 399,

where he admits that he has authorized Mr. Russell to make this kind of arrangement with Robinson; that he thought it wise; and that he is keeping himself purposely ignorant

of the arrangement which Mr. Russell has made, in order that it may not be elicited from him on cross-examination.

Oliver's consciousness that this was a corrupt bargain is conclusively admitted by the following questions and answers:

Q. Did you not arrange then to make some arrangement?

A. No.

Q. Did he not want a stipulation signed then on paper between you and him?

A. No; I did not mention about it.

Q. At any time before you left Alpena?

A. No.

Q. And did you not tell him that you would not do anything till you came to Buffalo and consulted with your counsel, and then you would do what he told you to do?

A. No; I think there was nothing said that evening about any paper.

Q. Then the next morning or the next evening, at all events, at Alpena at that time.

A. No. I did not say anything about any arrangement, *because he* (Robinson) *knows too much about matters;* he said if he could see his attorney he might make some arrangement; that he had some papers."

Record, p. 399.

Robinson first in his testimony denies the proposition to Oliver, as follows:

Q. Did you not then and there, at Alpena, on one of those days and at one of those places, propose to him (Oliver) to sell out the Buffalo parties in this suit?

A. No, sir.

Q. Have you not sold out the Buffalo parties in this suit?

A. No, sir; they have been undertaking to sell me out.

Q. Have you not an agreement with Oliver, or with some

one representing him, by which you would furnish testimony and papers in this suit and enable him to get a decree against the Buffalo parties?

A. No, sir.

Q. Have you not authorized such an arrangement to be entered into by you?

A. No, sir; *I don't think I have.*

Q. Did you not propose that to Oliver at Alpena, and didn't he say that he would not do anything until he had taken counsel; and that if his counsel thought well of it, he would telegraph you?

A. I don't recollect any such conversation.

Record, pp. 429, 430.

Afterwards, under the pressure of a cross-examination, while he does not specifically admit the proposition to Oliver, which, as has been seen, Oliver had already admitted on his cross-examination, he owns up that he has carried out the proposed intent, and expressly declares that he has furnished Oliver's counsel with all the documents and papers that he could get without a very great deal of labor, and had made abstracts of letters that he had brought down for the guidance and information of Oliver's counsel, which he, Robinson, has handed to Mr. Russell, while he, Robinson, was on the stand as a witness, and had shown him in interviews had with him before he went on the stand; but when asked if he did not tell him what his testimony would be on certain points, declares that he don't think that he told him anything about it, that he *wrote out about what there was about it and gave it to his counsel*, with permission to give to Mr. Russell.

Record, pp. 431 and 432.

And in conformity with the arrangement, he substitutes Hawes as his solicitor in place of the Duffields. Hawes, in pursuance of this corrupt arrangement, lays in with Mr.

Russell, and at Buffalo, before Mr. Russell's arrival, cross-examines defendant's witnesses, and makes objection to their testimony on behalf of and in the interest of the complainants.

Record, pp. 470, 471, 478, 485, 487, 493, 496.

Robinson obtains his discharge in bankruptcy,

See petition of G. B. Hunt, filed in this cause on the 5th day of June, 1879.
Original Record, p. 90, p. 171.

And has never pleaded it in this case, although he is presumed to know that if any decree is rendered against him, subsequent to his discharge, it will be valid and not effected thereby.

In consummation of this bargain, with the "innocent and much wronged" complainant, he commits deliberate perjury, as is shown beyond the shadow of a doubt by the self-contradictions between his present testimony and the statements in his answer and deposition in the former case, re-asserted in his answer in the present case.

Record, p. 33.

To the effect that Hunt was represented in the firm by Cunningham.

Record, p. 37.

Concerning the scheme or arrangement that Hunt should put Cunningham in the firm to represent him and Eschleman,

Record, p. 38.

He testifies that Exhibit "Z" is an original, but is unable to explain what the word "copy" means in front of C. Haines & Co.'s signature.

Record, pp. 405, 439, 440.

He admits that in his answer he swore that Cunningham never was a partner until some time in January, 1869, when

he purchased an interest of Robinson, Haines & Co., and that Hunt and Eschleman, and Henry M. Robinson, are not, and never have been, partners at any time, and that he denied any such conspiracy or agreement to defraud or swindle Oliver, as is charged in said bill.

Record, pp. 440, 441.

And he also admits that he denied, unequivocally and totally, the testimony of Melville, in regard to a plan or scheme between Robinson and others, of excluding Oliver from the business.

Record, p. 441.
See also p. 442.

On the latter page he admits that in his former deposition he swore positively that there were no articles of co-partnership of Cunningham, Robinson, Haines & Co., although he now admits that he had them in his possession when he gave his testimony.

Record, pp. 442, 443.

As a proper conclusion to his testimony he admits that his motive in giving this testimony is not in the simple interest of truth, but that a pecuniary interest leads him to give it, and that it is inspired by self interest, which he says "inspires every act of my life."

Record, p. 456.

Probably the only true statement in the whole of his long deposition.

Although it seems a work of supererogation, we call the court's attention to his complete, unqualified, and direct contradiction by other witnesses, in every instance in which his statements were susceptible of comparison with those of others. And we call attention to the difficulty which counsel on cross-examination had to pin him down to any definite or tangible statement which could be contradicted by others.

He asserts in his testimony in this case, with the evident view of putting himself in a favorable light before the court, that all the other parties in the suit were reluctant to have Oliver sell to Wheeler and Weston, or to anyone but themselves.

Record, p. 412.

This statement is contradicted by the testimony of Wheeler,

Record, p. 469.

By the testimony of Weston,

Record, pp. 495–7.

By the testimony of Mr. Evans,

Record, p. 505.

By the testimony of Cunningham,

Record, p. 567.

By the testimony of Hunt,

Record, pp. 584, 586.

By the testimony of Ranney, emphatically,

Record, p. 607.

and by the testimony of Haines.

As to Hunt and Eschleman being the contemplated partners in the firm of Robinson, Haines & Co., he is contradicted

By Hunt,

Record, pp. 585, 586.

By Eschleman,

Record, p. 529.

By Cunningham,

Record, p. 571.

By Haines,

Record, pp. 485, 486.

By Ranney,

Record, pp. 609, 610.

From the testimony it clearly appears that at the time

Robinson, Haines & Co. purchased under the Buffalo agreement, no particular person was contemplated as a partner, but they had generally a vague hope of inducing some moneyed man to go into the concern. Haines' and Ranney's testimony indicates that their first choice, or the one they most hoped to secure as a partner, was Evans, and that their "contemplation" of Cunningham, Hunt and Eschleman joining the firm was one in which the wish was father to the thought, and not one that was founded on any consent or agreement of either of those gentlemen.

As to the meeting at Tonawanda, at which he says this scheme was discussed, he is contradicted by every person whom he names to have been there.

Record, pp. 433, 434, 530, 586.

As to the meeting at Duffield's office, at Ranney's instance, he is flatly contradicted by Ranney and Cunningham.

Record, p. 609.

Unless his testimony is strongly confirmed by documentary evidence, we confess we are utterly unable to conceive how this court can place any reliance, even the slightest, upon it. He stands before the court as a self-convicted, deliberate perjurer, and it is beyond argument or evasion that he has, either in his answer or testimony in this case, or in his former answer and testimony, willfully, knowingly and deliberately sworn falsely. Whatever may be the result of the present cause, it is a great shame, and a great wrong to justice, that this man escapes with merely the comments of counsel from the consequences of the crime which it is manifest he has committed.

His testimony is not corroborated by any documentary evidence, except that of his own making, or by any extraneous testimony.

It is weakly contended by complainant's counsel that two

papers which are in the case corroborate it; but even if they did—which we utterly deny—they were both written by his own hand, and upon close scrutiny are entitled to no weight as supporting his testimony.

These are his letter to Melville, of September 28th, 1868, the material portions of which are found in the printed record of the former case,

> **Exhibit "G," Record, vol. 2, p. 1586.**
> **Exhibit "Z," first introduced in this case, Record, pp. 1105–6.**

and which Robinson in his testimony in the former case denied to have ever existed.

The *first* cannot refer to the conversation with Cunningham and Ranney to which he testifies, because he says distinctly that the conversation took place after the Buffalo agreement. There is no mention of Hunt or Eschleman in it. The reference to Cunningham is wholly indefinite.

Again, the whole tenor of the letter, which is written to his foreman, shows that there is danger of trouble with his men on account of wages past due; and it seems to us clear that he was, in this letter, giving false assurances to his foreman in order that he might therewith temporarily satisfy them.

Exhibit "Z," which was so mysteriously absent from the files of Exhibits until its absence was charged upon Robinson by the defendant's counsel, is also a document written by himself, and, in the light of the testimony of Mr. Ranney, is no proof whatever of anything other than such a vague and indefinite contemplation of Hunt and Eschleman becoming partners as that testified to by Haines and Ranney.

It is clearly not the original, as Robinson testified, because the word "copy" is found written in front of the signatures at the time he produces it; and it is almost incredible that

articles of partnership should be entered into by parties in the form of such loose and ragged penciled agreements. Surely the attitude in which this witness stands before the court is such as to fairly raise the presumption that he would not hesitate to concoct and manufacture such a paper for the purpose of bolstering up his own statement.

Ranney's admission that he signed a paper in terms like this exhibit, in no wise confirms Robinson, because he says that at the time the paper was purported to be executed, the contemplated partner of whom they had the most hope was Morrison W. Evans.

There is also a very noticeable alteration of the date of the said agreement, from the month of September to November, and an inspection of the document will show that the alteration is evidently made at a time long subsequent to the writing of the body of the instrument, and that the original date was September 3d, 1868. Now, at this very date, Haines and Ranney held the Lockport agreement, so called, and were trying to induce Evans to go in with them, so that the agreement, if any such ever existed, must have referred to this purchase, and could not refer to anything to be done under a plan based on Oliver's deeds to Cunningham, for these had not then been executed, and his entries in his day-book and the alarm testified to by him in the former suit are subsequent to the original date of this agreement. It is impossible to believe his present fiction, that the agreement refers to Hunt and Eschleman.

It is noticeable also, that although Robinson testifies that at the time it was expected Cunningham should represent the interest of Hunt and Eschleman, yet this paper contains no mention of that fact whatever; and in this connection, what seems to us a conclusive circumstance, is the impressional copy of a letter from George J. Robinson to D. B. & H. M. Duffield—which was also mysteriously absent from the exhibits in the same package with Exhibit "Z," until com-

ment was made by defendants' counsel on the absence of the latter.

That letter is dated November 4th, 1869, Ex. "2 Z," and contains the following statement, incomprehensible now, if Robinson is telling the truth:

"The relations of C. Haines & Co. and George J. Robin-
"son, the first party, and H. S. Cunningham and David D.
"Oliver, the second party, does not appear to be fully under-
"stood by you—at least it so appears to me. At the time
"of the purchase Mr. Evans was the contemplated party
"who was to take that interest that afterwards was sold by C.
"Haines & Co. and G. J. Robinson to H. S. Cunningham.
"The first party knew nothing of the relations existing
"between Cunningham and Oliver, and had no reasons,
"implied or expressed, to believe that Cunningham was act-
"ing as agent for Oliver, but had every reason to believe
"that the sale was *bona fide*, although Oliver's name appears
"in the contract made between C. Haines & Co. and G. J.
"R. and H. S. Cunningham, and that their part was, it
"appears, only as shifting the obligations existing between
"Cunningham and Oliver so as to relieve Cunningham from
"the business and placing it upon C. Haines and G. J. R.,
"and not making Oliver a party to the contract. So far as
"Haines, Ranney or Robinson were concerned, there was
"no negotiations or talk of any kind with Oliver; they
"knew that Oliver and Cunningham were in conference,
"*but knew nothing of its import.*

"It is true that Oliver read the agreement by Cunning-
"ham's invitation, and by no one else's, as between Cun-
"ningham and himself, who were interested in it, and not
"as between Haines & Co. and Robinson. The C. Haines
"& Co. mortgage against Hawkins was assigned to G. B.
"Hunt some time ago, and we have paid Hunt four thousand
"dollars.

"[Signed,] GEORGE J. ROBINSON,
"*For self and C. Haines & Co.*"

On this testimony rests all the evidence of a conspiracy antecedent to the Buffalo agreement, and there is none whatever as to any conspiracy formed before the deeds from Oliver to Cunningham.

Can complainant come into court, fresh from such a corrupt bargain as that between Oliver and Robinson, in which Robinson virtually binds himself for a reward to commit perjury, and claim clean hands?

We feel convinced that the court will not give heed to such testimony.

And now let us see how lame a case complainants' is without it.

The two salient questions arising in the suit are concerning the alleged Cunningham trust and the Buffalo agreement. Around these center all that is material to consider in the case.

First, as to the alleged Cunningham trust.

Even as stated in the bill it is a void trust in its inception. The bill states and it is wholly conceded that there was no written statement of the arrangement, but it rested solely in parole.

The Michigan statutes upon this subject are as follows: "No estate or interest in lands other than leases for a term not exceeding one year, nor any trust or power over or concerning lands or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing."

Howell's Annotated Statutes (Mich.), vol. 2, § 6179.

Trask vs. Green, 9 Mich. R., pp. 358–366.

"Uses and trusts, except as authorized and modified in "this chapter, are abolished, and every estate and interest in "lands shall be deemed a legal right, cognizable as such in "the courts of law, except when otherwise provided in this "title."

Howell's, etc , *ubi sup.*, vol. 2, § 5563.

It is settled law in Michigan that express trusts in lands cannot be raised by parol.

Wright vs. King, Harr. Ch. R., p. 12.
Bernard vs. Bougard, Harr. Ch. R., p. 143.
Brown vs. Bronson, 35 Mich. R., p. 418.

Unless the arrangement was a mortgage then there is no question but that the deed being a voluntary one and reciting a valuable consideration and declaring the uses to Cunningham, it cannot be attacked or its effect altered by testimony of any parol arrangement or understanding.

Jackson vs. Cleveland, 15 Mich. R., p. 94.

We submit that the arrangement alleged in the bill does not constitute the transaction a mortgage.

McLanahan vs. McLanahan, 6 Humph. R., p. 99.
M. Menomy vs. Murray, 3 Johns. Ch. R., p. 435.
See also Hewitt vs. Huling, 11 Penn. St. R., p. 27.

It is an essential requisite of a mortgage that the deed should become void or there should be a reconveyance.

Baker vs. Thrasher, 4 Denio R., p. 495.
Breese vs. Bange, 2 E. D. Smith R., p. 474.

But in the case at bar, under one of complainant's sworn theories, the deed must forever stand as a part of Hawkins' claim of title, and under the other there is no reserva-

tion of the right to redeem, which is indispensable to a mortgage.

Cooper vs. Whitney, 3 Hill R., p. 95.
Chaires vs. Brady, 10 Fla. R., p. 133.
See also Hogan vs. Jaynes, 19 New J. Eq. R., p. 123.

Even if one good trust be inserted in the arrangement it will not support the transaction as a whole.

Kirby vs. Ingersoll, Harr. Ch. R. (Mich.), p. 172.

It is also void because it is intended to hinder and delay creditors.

See Cunningham's testimony, Record, pp. 550–559,

that Oliver states that suits were threatening and perhaps had been commenced, and that the date is put back to cover such a contingency.

The statement in the bill is contrary to that in the answer to the foreclosure bill and in the first and second cross-bills.

In that answer and the first and second cross-bills, it was alleged as above stated, and it was not pretended that Hunt and Eschleman had been in anywise interested in this transfer.

See opinion of Judge Longyear, Record, vol. 2, p. 1170.

And the court also found on the hearing of the foreclosure and cross-bill suit that the evidence had failed to prove that any such trust ever existed in parol, while if it did it was void.

See Judge Longyear's opinion, Record, vol. 2, p. 1170.

The court also found that the Buffalo agreement was made by Oliver as written, and had been by Cunningham substantially carried out and performed.

See Judge Longyear's opinion, Record, vol. 2, p. 1170.

So much for the "first step" in the bill.

The conveyance by Oliver was voluntary.

It was not induced by any representations of Cunningham or any one.

And here the complainant, with remarkable inconsistency, drops the proposition "C," and starts out on the (for complainant) new theory that these transfers were to enable Cunningham to make a sale for Oliver's benefit. In his answer and in both cross-bills he had charged under his oath that the transfer to Cunningham was made upon the specific trust set out in minute detail. In this bill he coolly says that as the court found that this was not true he alleges that the object of the transfer was to enable Cunningham to effect a sale.

Record, p. 13.

Second, as to the Buffalo agreement.

This brings us to the second question in this case, and one on which complainant has exhibited as much inconsistency and about which he has made as many contradictory statements as the former, viz., the Buffalo agreement. The written agreement (Record, p. 30) was in substance that Cunningham should deed to Robinson, Haines & Ranney all the lands conveyed to him by Oliver, and situate in Towns 28 and 29 North, Range 8 East, and transfer all the personal property to them subject to the claims therein named. And in addition that he would assign the Preston land contract to said Robinson, Haines & Ranney, or if he should acquire title to the Preston lands, then he was in lieu of assigning the contract to deed the lands to them. All of these Preston lands which were in Towns 28 and 29 North, of Range 8 East, were to go to Robinson, Haines & Ranney, and all outside of those towns were to go to whomsoever Oliver should name. Robinson, Haines & Ranney, on

their part, agreed to take said property subject to said claims, and either pay one-half of the E. & G. R. Haines mortgage, which amounted to about $10,500, and release all mortgages of Hawkins to C. Haines or E. & G. R. Haines, and save him harmless therefrom, *or in lieu of this* they had the option to procure the C. Haines & Co. mortgage from Hawkins to be assigned to Garret B. Hunt, and in addition to pay to Hunt $4,000 before November 3, 1869. It was further agreed that if Cunningham within 30 days paid to C. Haines & Co. $16,000, and to George J. Robinson $25,000, then he was to be released from said agreement, and Robinson was (when he was indemnified against Oliver & Robinson's liabilities), to convey to Cunningham all his interests in the property, and in any property he might have in Alpena and Alcona counties, and to release all claims of Henry M. Robinson upon the same, but Cunningham was in such case to discharge the George J. Robinson bond and mortgage, and C. Haines & Co., on their receiving said $16,000, were to release the C. Haines & Co. mortgage and any mortgage held against Hawkins and to release all claims against Oliver & Robinson, or Oliver and Cunningham, except two notes specifically described, on which was unpaid about $1,600, and it was further agreed that in case Oliver's deeds to Cunningham did not include all of Oliver's interest in lands in Towns 28 and 29, except his homestead, then Cunningham was to hold the outside lands of the Preston contract until Oliver conveyed to said second parties all his interests in lands in Towns 28 and 29 not conveyed to Cunningham. In brief, Oliver, by Cunningham, his trustee, was to convey subject to those claims all the lands in Towns 28 and 29, and was to receive therefor in addition to the $4,000 to be paid to Hunt and the assignment to Hunt of the Hawkins mortgage, all of the lands conveyed by him to Cunningham, and also all of the

Preston lands which were outside of Towns 28 and 29. These amounted to

Preston lands	3280 acres.
Lands in Schedule D Bill	2280 acres and 12 lots.
do F do	640 acres and 5 lots.
Total	6200 acres and 17 lots.

Also lands in Schedule E, cross-bill, 3 fractional blocks and 6 lots in Alpena.

These lands were not encumbered by the Hunt and Eschleman mortgage, nor so far as the case shows by any claims whatever. Certainly the Preston lands were not. They became Oliver's free and clear. Melville testifies that they were worth $40,000.

Record, p. 458, and vol. 2, p. 1330.

For this Oliver released entirely his interest in the lands described in Schedule E, subject to claims amounting to upwards of $95,000. Such was the Buffalo transaction according to the written contract.

A debtor who was financially bankrupt was thereby relieved of $97,000 of indebtedness and put into possession of $40,000 worth of real estate clear and unincumbered. Surely not a very iniquitous bargain.

In his answer to the foreclosure bill and in his first cross-bill, he alleged that this agreement was not drawn according to the terms verbally assented to by him, but that although the agreement as written was not such as was stipulated, it did state that Robinson, Haynes & Ranney were to pay, or free the complainant from all obligations on the various mortgages named in it.

See first cross-bill, Record, p. 1185.

In his amended cross-bill he re-avers this statement, viz., that in the Buffalo agreement he was to be discharged from personal liability upon the mortgage to Hunt and Eschleman.

Upon this branch of his case Judge Longyear found that the complainant's objections to the Buffalo agreement as written could not avail him.

1st. Because he did not state in what particulars it varied from that to which he had assented.

2d. Because he did not seek to have it reformed.

3d. Because he has acted upon it, and received conveyances of land under it.

4th, and lastly, because he asked to have it enforced.

With an assurance that might be humorous, did it not trench so closely upon perjury, Oliver now swears, in the bill in this suit, to what he knows has been found false; endeavors to set aside an agreement which a court of competent jurisdiction has found to have been written just as he agreed to, and determined to be conclusively binding on him; and under which he has obtained hundreds of acres of land, and has been relieved of many thousand dollars of liability, to wit:

$10,000, Preston liability.

1,000, paid on Hill mortgage.

30,000 to $40,000, paid on Oliver & Robinson's debts.

50,000 in round numbers, paid on Hunt and Eschleman mortgage.

His rights to the lands, outside of towns twenty-eight and twenty-nine, testified to by Melville to be worth forty thousand dollars (Record, vol. 2, p. 1330), have never been denied, since such agreement, and are conceded by all the defendants. Even complainant makes no pretense that Cunningham has not been always willing and ready to deed to him any of those outside lands; and since the alleged conspiracy he has never been pressed or sought to be made personally liable on any of the claims covered by the Buffalo agreement, with the single exception of Henry M. Robinson's suit on the bond accompanying the Wayne mortgage.

The sole remaining charge, on which his theory of the conspiracy rests, is his claim that Hunt, Eschleman and Cunningham were partners—represented by Cunningham—in the business of Cunningham, Robinson, Haines & Co., and have made large sums of money out of said partnership.

If the Buffalo agreement is found by this court as Judge Longyear found it—and we think it must be so found, not only because it is *res adjudicata*, but also because the proof clearly sustains his finding—to have been agreed and assented to by Oliver, and that he was bound by its terms and had accepted benefits under it, it would seem unnecessary to go over any of the testimony, but the whole of the complainant's claim could be disposed of against him on his own showing, for he does not prove one element of conspiracy, and there is nothing shown which reflects on the appellants.

Viewed in this light, viz., that the Buffalo agreement was fairly entered into and consummated, there is no reason why Cunningham or any of the creditors could not rightfully have bought into the firm of Robinson, Haines & Ranney, and made whatever money there was to be made, even if the Buffalo agreement had not been substantially performed by them, which, they all allege, has been the case, so far as its performance was not prevented by Oliver's own acts.

They certainly deeded as much outside lands as Oliver asked.

Paid Preston twelve thousand dollars that Oliver owed him on his contract.

Paid Hill one thousand dollars.

Paid Hunt and Oliver four thousand dollars, and

Protected Oliver from all personal liability on the Hunt and Eschleman mortgage of fifty thousand dollars.

We insist, therefore, that upon Oliver's own showing,

there is absolutely not a shadow of evidence to charge these defendants with any conspiracy or fraud or wrong upon Oliver, or with any act which they might not rightfully have done, and this whether their acts be regarded from the law side or in the more searching light of equity.

If we review the testimony, the complainant stands in even a less favorable position.

As we have seen, the three points upon which he claims relief are,

First, That he was possessed of real and personal property largely in excess of his indebtedness.

Second, That the defendants attempted to defraud him out of said property, and procured the execution of the deeds to Cunningham; and

Third, That the Buffalo agreement was procured by misrepresentation; that the same was not written as agreed to, and the transfers and conveyances of his lands under it to Robinson, Haines & Co., were in fraud of his rights.

With regard to the value of the property,

By his own admission, this property was incumbered as follows:

The Hunt and Eschleman mortgage, which the testimony shows amounted to, ...	$ 37,450
C. Haines & Co., mortgage, which the testimony shows amounted to, ...	15,000
E. & G. R. Haines, mortgage, which the testimony shows amounted to, ...	13,000
The Wayne mortgage, which the testimony shows amounted to, ...	12,000

Claim of David Preston, which the testimony shows amounted to, ...	$12,000
Floating debts, ...	6,000
Debts of Oliver & Robinson estimated at, . .	30,000
Total, ...	$125,450

Upon his own basis of valuation the property was worth two hundred and seventy-two thousand dollars, ...	$272,000
Oliver's proposition of June 9th, 1868,	
Of which one-fourth, ... belonged to George J. Robinson, who was, according to Oliver's statement, in possession, to Oliver's exclusion, and could only be gotten out by litigation,	68,000
Leaving Oliver's interest, ...	204,000
A margin, upon Oliver's own valuation, of only,	78,550

In this connection it is significant to recall his charge in his answer and cross-bill, that he sold a one-quarter interest in this same property to George J. Robinson, for $35,000, and $5,000 of that was to go into the firm as part of its working capital. On this basis the property he now appraises at $272,000, was worth but $120,000, or $140,000 at the outside.

It is such a showing as this on which he pretends that Hunt and Eschleman were likely to be induced to come in and accept the proposition of June 9th. But the testimony shows, as it seems to us, conclusively, that these values are largely exaggerated and fanciful.

Before taking up the testimony of disinterested witnesses on this head, we call attention to the facts which Oliver admits:

That in the fall or winter of '66 and '67, and up to May

or June, 1867, Hawkins was associated with him as a partner, having a half interest in these lands, and gave up his contract for one thousand dollars.

The complainant, feeling the force of this fact, backs and fills until he is compelled, under a rigid cross-examination, to admit it; he says he don't know how much Hawkins was to put in; don't know what lands he was to have an interest in; that he don't know how many lands he himself owned in 1866.

Robert B. Oliver, a nephew of the complainant, and who is security for costs in this suit, was a partner of the complainant during the same period, having a half interest with Hawkins.

Record, p. 365.

He accepted "a pair of horses, and perhaps a wagon," in payment of his interest in the firm, and cleared out.

Record, p. 366.

Or, as Oliver admits, sold out his interest for enough to get out of town with, and went off.

Record, p. 366.

This was in June, 1867, but a little over a year prior to the deeds to Cunningham!!!

Oliver also tries to evade the eliciting of this fact, and he says he don't know what the agreement with R. B. Oliver was,

Record, p. 365,

although in his bill he charges that this R. B. Oliver was a partner with him and Hawkins; that he cannot remember anything about it.

Record, *ubi sup.*

He is compelled to admit that Hawkins and R. B. Oliver were partners with him, but he cannot tell the terms.

Record, *ubi sup.*

But the *disinterested testimony* in the case conclusively contradicts Oliver, as follows:

William F. Wheeler, an entirely disinterested witness, says Oliver offered him and Weston this same property for its debts; that he examined the property personally, and that he would not take it for the incumbrances upon it;

Record, p. 465.

that the water mill was not worth anything;

Record, p. 467.

this was in October, 1868;

Record, p. 468.

that Hunt, in order to induce him to purchase instead of C. Haines & Co., offered him such time as he wanted on his mortgage and offered to throw off five hundred dollars from his claim.

Record, p. 469.

An attempt is made by counsel for complainant to show that the offer to Wheeler did not include the personal property, because Wheeler does not remember that anything was said about it; but we think it is clear from the testimony of the parties who were present at the time of the Buffalo agreement, and at the time of the visit of Wheeler and Weston to Buffalo, that the same property was offered to them, and upon the same terms that were offered to C. Haines and Robinson. Wheeler testifies that even after the sale to Robinson and Haines *they offered the property to him* on the same terms, and that he still declined buying.

Record, p. 470.

And he testifies that the statement of the incumbrances on the property which Oliver showed him amounted to one hundred and fifteen thousand dollars.

Record, p. 465.

Abijah Weston, another disinterested witness, was offered the property on the same terms that Robinson and Haines took it.

Record, pp. 494, 495.

Morrison W. Evans—Examined the property, and had Johnson, a landlooker, also examine it; the property was offered to him on the same terms that were given to Robinson and Haines. He was not to pay the claims, but to take the property subject to the claims.

Record, p. 504.

He did not consider the property worth the amount; Haines tried to get him to buy it under Haines' refusal before the Buffalo agreement. He represented the property of so much value that Evans went and examined it and found that it did not come up to Haines' representations, and did not take it. Thought all along that Haines appeared anxious to get rid of it, and, after he and Robinson had bought, they several times offered Evans the property upon the offered terms on which they had taken it.

Record, pp. 504, 505, 506.

Lee R. Sanborn, who owns the mill now at the mouth of Devil river, and has lumbered on the property for a number of years, testifies that the lumber was from one-third to one-half Norway; that the white pine did not run to uppers to exceed five per cent, and that the character of the timber was not as good as ordinary Alpena timber; that Devil river had not a capacity to feed the water-mill and the steam-mill at the same time, and that the water-mill was of no value at all.

Record p. 475.

Jacob S. Seaman has inspected this Devil river lumber from time of commencement of business of Cunningham,

Robinson, Haines & Co., and the general run of the lumber was a low grade, 65 per cent common, only three to five per cent uppers, and balance shipping culls.

Record, p. 523.

Burr F. Cartwright,

Record, pp. 525, 526.

And John Bowles,

Record, pp. 554, 555,

inspectors of lumber, who inspected the Ossineke lumber, testify that it was a poor quality of lumber, largely Norway, and the white pine did not run more than five or ten per cent uppers, and from twenty-five to thirty-five common, with considerable refuse culls.

Malcom McDonald,

Record, p. 615,

Knew the property thoroughly, had lumbered it three or four years in the employment of Mr. Oliver, and Oliver & Robinson.

He testified that the water-mill was not worth anything; that there was not water enough in Devil river to run logs enough for the steam-mill continuously, and that they had to stop the mill every five or six days.

Record, p. 619.

That the steam-mill, before the improvements were put into it by the firm of Robinson, Haines & Ranney, was not worth ten thousand dollars; the land contiguous, and the boarding houses, not to exceed five thousand dollars; that the pine land in 1870 had about twenty million feet of pine, worth, not to exceed two dollars per thousand—forty thousand dollars; that in 1869 and 1870, which were the years that

Cunningham, Robinson, Haines & Co. lumbered, they cut off about five million feet.

Record, pp. 619, 620.

This would put the pine lands in 1868 with a capacity of about thirty million feet, equaling sixty thousand dollars.

He testifies that the docks had not water enough for vessels to load, and they had to be lightered. That three-fifths of the lumber was Norway; and he gives a plain and a clear reason why the steam-mill and the water-mill could not be run at the same time.

Record, p. 621.

E. M. Fowler,

Record, p. 624,

purchased the standing timber of Hunt, after the foreclosure sale; has been on the lands and had Burnett examine them for him in 1874; estimated that there was about twenty-three million feet of pine on it; has lumbered it since then and the amount that they have taken off verified the estimate very closely.

Record, pp. 626, 627.

In their operations there was a loss of one dollar a thousand on the small logs that were put in.

Record, p. 627.

For short log purposes the timber would not be worth over fifty cents a thousand, and for any purpose two dollars a thousand would be all it was worth.

Record, p. 628.

Gave forty-six thousand dollars for the twenty-three million feet.

Devil river is not a good river to drive on; is not safe to load it with over three million feet of logs in the season.

Record, p. 629.

The white pine will not run over from six to eight per cent. to uppers.

Record, p. 629.

John Burnett,

Record, p. 630,

Examined Devil river property for Mr. Fowler.

There were about twenty-three million feet on the land according to his estimation.

Record, p. 632.

For short log purposes it was worth not to exceed fifty cents per thousand ; and for any purposes, short logs or long timber, it was worth not to exceed $1.75 per thousand.

Record, p. 632.

He corroborates Mr. Fowler fully, as to the character of the timber, proportion of white pine and Norway, and the per centage of uppers.

There is no evidence, whatever, of any antecedent or contemporaneous fact tending to establish the charge that Cunningham obtained the deeds in pursuance of a conspiracy. Even the complainant himself does not claim that his deeds to Cunningham were other than purely voluntary, or that Cunningham made any representation, promise, pretense, or agreement, which induced the complainant to make the deeds. Indeed, as to this part of his case, he expressly plants himself in his bill, upon the statement of Cunningham, which Judge Longyear had already found to be true ; that the conveyances were made to him in order to facilitate Oliver's making a sale of the lands. We submit that, inasmuch as he expressly adopts Mr. Cunningham's version of the trust, he must adopt it in whole, and the court must consider as true Cunningham's statement in connection therewith ; and that he came to Ossineke and accepted the deeds at Oliver's request, and because of Oliver's fear of attachments and levies.

The Buffalo agreement and the transfer and conveyance of Oliver's lands to Robinson, Haines & Ranney.

We have seen that thus far, if we leave out of view Robinson's testimony, there is no evidence of any conspiracy.

All of the witnesses who were present during the negotiations which resulted in it, at the time of its execution, testify that Oliver was present and assented to it.

The letter Exhibit "2-Z," referred to in connection with G. J. Robinson's testimony, is his declaration, supported by his testimony, as appears in

Record, p. 1136,

while Hunt, Eschleman, Cunningham, Haines, Ranney, Barton, and Williams who drew the agreement, all unite in the statement that the same was satisfactory to Oliver, and not one of them intimates that it was obtained by any representations or pretense whatever.

Oliver is the sole witness who claims it otherwise.

Pending the thirty days which were given to Oliver to obtain other purchasers, all of the defendants were willing, and all but George J. Robinson desirous, to have other parties take the property on the same terms.

See the testimony of Wheeler, Evans and Weston, Hunt, Eschleman, Ranney and Haines, referred to above.

It is a remarkable fact that although Oliver in the present case claims that this agreement as written was a gross conspiracy against him, he furnishes no testimony, and there is none in the case, to indicate that he was other than entirely satisfied with it.

In this connection his letters to Cunningham of October 6th, 1868, and November 6th, 1868, are material, and as it seems to us, conclusive.

(For easier reference see printed record, p. 49.)

The later one was written after he admits that he had read the agreement in Williams' office, at which time, by the way, Barton testifies Oliver found no fault, nor did he subsequently, on a later visit to Barton, when he gave him a spiritualistic paper.

Record, p. 501.

But what seems to us a conclusive piece of testimony as to the *bona fides* of the Buffalo agreement, is the agreement Exhibit "N," dated October 2d, 1868, and signed by Oliver himself. It tallies in every respect with the agreement made the next day by Cunningham, with the trifling exception that the former contains a statement that Haines & Co. and Robinson are to assume certain indebtedness of Oliver's, while Cunningham's agreement says they were to take the property subject to the indebtedness.

(For easier reference we refer to printed record, vol. 2, page 1623.)

Oliver executed a deed to these very parties, which he admits was made in consummation of said agreement, on the 12th of November, 1868, and it was signed by his wife by his procurement at Ossineke, Michigan, two weeks after Cunningham, as Oliver avers, in his bill and testimony, had openly assumed an interest in the partnership with Robinson and C. Haines & Co. Is it possible to construe these circumstances consistent with the allegations in his present bill and deposition, that the Buffalo agreement was not written as he had verbally assented that it should be, and that the same was a fraud and a wrong upon him.

Again, if we look at the agreement itself, it is impossible to avoid the conviction that it was a very beneficial one for the complainant.

It provided, in brief, that Cunningham was to deed, subject to the above-mentioned claims, amounting to ninety-five thousand dollars, all the lands in towns 28 and 29 north,

of range 8 east, which had been conveyed to him by Oliver and wife, also the personal property conveyed to him by Oliver; and Oliver was to receive therefor, in addition to the four thousand dollars to be paid Hunt, and the assignment to Hunt of the Hawkins' mortgage, all of the lands conveyed to him by Cunningham, and all of the Preston lands which were outside of towns 28 and 29;

These, as we have shown, amounted to—

Preston outside lands, ...	3280 acres.	
Lands in schedule B, ...	2280 "	and 12 lots.
" schedule F, ...	640 "	and 5 lots.
Total, ...	6200 acres	and 17 lots.

In addition, lands in schedule "E" of cross-bill, three fractional blocks and six lots in Alpena.

All of these lands were to be deeded back to Oliver upon the performance by Robinson, Haines & Co. of the agreement, and the execution of Oliver's deed of the 12th of November, already referred to, for the execution of which the *outside Preston lands* were held as security. This is the reason they were specially mentioned. The other outside lands, it will be seen on comparing the descriptions in the Buffalo agreement, are not included in the property to be deeded by Cunningham to Haines & Co. Cunningham is not to deed to Robinson, Haines & Co. any lands outside of towns 28 and 29 north, of range 8 east.

As we have already seen, further to aid Oliver in his necessities, Cunningham procures the insertion of the provision giving him, for Oliver's benefit, thirty days in which to sell the property to any other parties whom he could induce to take the same upon the same or better terms for Oliver, the amounts to be paid being the same mentioned in the agreement which Oliver signed October 2d, 1868.

Record, vol. 2, p. 1623.

That Oliver was well satisfied with the arrangement at the time, and realized the advantage there was in it to him, is shown by the testimony of Cunningham and Hunt, who state that he said, "that if he had as much money as he could carry, he would not take the property back and pay its debts."

Record, pp. 563 and 583.

Not only was the Buffalo agreement beneficial to Oliver, but every stipulation in it for his benefit has been performed by the parties, except where his own conduct has prevented performance; the four thousand dollars has been paid in on Oliver's account, the Hawkins mortgage has been assigned to Hunt as agreed, all the outside lands which he has ever requested to be conveyed to him had been conveyed as soon as called for, and the defendant Cunningham held himself ready to comply with that agreement in any particular at any time, and has repeatedly so asserted in the various answers which he has filed to this complainant's multiform litigation.

The association of Cunningham in the partnership of Robinson, Haines & Ranney.

Great stress is laid by counsel for the complainant upon the fact that Cunningham appears as a partner in the firm of Robinson, Haines & Ranney under circumstances which they claim seemed to indicate that his contribution of capital to the concern was the thirty-five thousand dollar purchase money mortgage of Hunt and Eschleman.

In connection with the fact, which is conceded, that the notes of Merick, Fowler & Lyon, which were given for the standing timber on said lands, although made to the order of Garret B. Hunt, were applied to the reduction of the company's indebtedness.

We will not repeat the argument, which we think convincing, showing that Cunningham went into said firm at about

the time when the articles of January 7th were executed, and not before, and that his entrance into said firm was not in pursuance of any previous understanding. If it has been sufficient to convince the court of its soundness, then it is clear that there was no objection either in law or in equity to the purchase by Cunningham of the interest in said firm and the payment therefor by his agreement to protect the property of the firm from the Hunt and Eschleman mortgage.

There is not a fact proven in the case which does not consist with the theory that Hunt and Eschleman were induced to permit Cunningham to stand between their mortgage and the firm of Cunningham, Robinson, Haines & Co., because of Cunningham's relationship to Hunt, and as a pure matter of accommodation to him more fully than with the theory of the complainant that Hunt and Eschleman made themselves partners in said business under cover of Cunningham's name.

The signing of the articles of January 7th, as stated in the testimony given by Hunt and Haines, when viewed from an impartial standpoint, carries no suspicion or any inference of wrong.

Those articles, upon analysis, will be found to be a simple statement of facts by the parties thereto, and contains not one sentence which bound any of them to subsequent action.

Henry M. Robinson was representing George J. Robinson, Haines was representing himself and Ranney, and Hunt was representing Cunningham, with whom he had agreed to loan his credit, by way of endorsement, to the purchase of the machinery from Wayne.

It is uncontradicted that Hunt signed the articles for Cunningham with reluctance, and only upon the express provision that they were subject to Cunningham's approval or repudiation. The subsequent acts of Hunt, his endorse-

ments for the company, which, it is true, reached a sum of money almost sufficient to absorb the Merick, Fowler & Lyon notes, are easily accounted for by the willingness of the rich man to aid in starting the husband of his only daughter, in what is to be presumed, it was then thought would become a profitable enterprise.

It is only when the acts and conduct of Hunt are viewed with a suspicious and prejudiced eye, that they in anywise tend to confirm the complainant's theory, while Eschleman is entirely disconnected either in interest or in actual transactions with the partnership or any of its concerns.

Viewed in the light of the present it is easily seen that it would have been better for the parties had Cunningham never taken an interest in the firm, and Hunt never aided it in any way; but if we put ourselves back to the first day of January, 1869, *it is as easily seen* that Cunningham might in perfect good faith and in all honesty have gone into that firm, and they have taken his agreement to protect them against the thirty-five thousand mortgage without thought or intent to injure Oliver in the slightest degree. There is no testimony, save George J. Robinson's, that such was not the case. His testimony, as we have shown, is utterly false.

In conclusion we submit,

1st. That Hunt and Eschleman are protected by the decree of foreclosure upon their mortgage.

2d. That upon the facts proven in the case there is no evidence worthy of credit which in anywise tends to convict them of any fraud, conspiracy or wrong upon Oliver, or to sustain any claim against them.

THE EXCEPTIONS TO THE MASTER'S REPORT.

Before discussing them in detail, we desire to state a few general considerations which seem to us important to be borne in mind when weighing the testimony in the case.

The modified decree charged the defendants as mortgagees in possession, and as such they must account for the issues, rents and profits of the property which actually came to their possession.

The onus is on complainant. He claims that property has come to defendant's hands, which operates as payment. Hence he calls on them to account. When they render that account, it is evidence *for* them as well as *against* them. And it is decisive evidence unless the complainant shall surcharge or falsify it. Complainant's evidence must therefore be of that nature. It must surcharge or falsify the defendant's account. It should therefore have reasonable certainty. When it purports to rest on actual knowledge it has a proper basis. When it is a guess, and a guess after a long lapse of time, it has no basis and is of no value. Exaggeration would be inevitable. Such loose evidence is not sufficient to overthrow an account and *a fortiori* when there is other evidence having reasonable elements of certainty.

The property with the receipt of which the defendants are charged was mainly logs and lumber. Logs and lumber are bulky articles hardly susceptible of secret conversion. There was no local market at Ossineke, which was a mere hamlet, and a market could only be reached by vessel. This method always has special and certain evidences of the transaction. It is obvious that all mere estimates and guesses must be tested by the evidence of the bills of lading. This test will either effectually sustain or impeach mere estimates. Against it the mere suggestion of possible omission or inaccuracy will not prevail. *Some proof* must be given to impeach the account.

The Eighth Assignment of Error

is based upon the ruling of the court sustaining the exception by the complainant to the finding in the master's report of the amount of standing lumber cut and removed by the defendants. The master made up the amount from the actual facts proven relative to the amount received and shipped. He found the amount to be 18,857,440 feet. The court rejected this finding, not for any error made in its computation, for none was shown, and charged the defendants with the amount of lumber estimated by the testimony of witnesses for the complainants to have been cut from the lands. This estimate was based upon an examination of the lands made six or seven years after the last cutting, and nearly twelve years after the earlier cutting.

First.

The painstaking manner in which the special master examined the testimony of the estimators, and the very careful consideration which he gave to the subject, as shown by the conclusions stated in his report,

Record, pp. 117–122,

seem to us to render unnecessary any extended argument in support of the correctness of his report.

We will only call attention to the following practically undisputed facts, which cannot fail to convince that an attempt to estimate the timber, with anything like accuracy, on the basis of the testimony of these witnesses, must be futile. It will be borne in mind that some of this timber had been cut nearly twelve years before the examination. There is no evidence which separates the sections, on which the Oliver & Robinson timber was cut, from those

on which the defendants cut. The witnesses had no pine to measure, the pieces for which defendants are made chargeable have been removed, but they estimated in their minds the pieces which they imagined had been taken away. In a large proportion of cases no tops were found, in a great many other cases the tops had been moved. As will be seen at a glance this would change the estimates. The estimators were unable to say whether they measured to the top which belonged to the stump from which they measured, or to some other stump. Even if the tops had not been moved, as is shown by the testimony of Gen. Alger,

Record, p. 809,

and other witnesses, it would be manifestly unfair to the defendants to measure from the stump to the top, without making a liberal estimate for the jump of the tree in falling. The stumps were marked by some of the estimators with chips or pieces of bark laid on them, by others by hacking the stump with an ax, and by others by laying a stick or green bough on the stump. In many places the ground was covered with a heavy undergrowth, and the estimators worked in separate parties, even over the same section, affording every opportunity for double estimates of the same pieces by different estimators. All of their estimates were computations of the number of feet, board measure, in pieces of timber, on the basis of Scribner's rule. The computations in this rule are based upon the theory or hypothesis that, in order to obtain the mean diameter of the piece the actual diameter is taken one-third from the top. That is, the measurer puts his calipers on the piece one-third from the top of the piece (See Rowland and McCaul's testimony).

Record, pp. 982, 989.

Yet it appears from the testimony of these estimators that over one-third of those who testify as to where they meas-

ured the piece to get the mean diameter (comprising nearly one-half the timber measured), took the diameter of the piece in the middle instead of one-third from its top. Defendants introduced in evidence a table of computations, according to Scribner's rule, attached to McCaul's deposition,

Original record, p. 1315,

reference to which is made in connection with the testimony of of Leonard Clewley,

Record, p. 754,

as to the diameter of a hypothetical piece, and to the testimony of Amos Burton,

Record, p. 745,

of Abram Crowell,

Record, p. 721,

of Albert E. Buchanan,

Record, p. 735,

of Alexander Taylor,

Record, p. 749,

of Frank Dyer,

Record, p. 767,

and Fred Buchanan,

Record, p. 779,

illustrating the large proportion of excess which would follow such erroneous measurement. As is shown by the master, the testimony of these witnesses charges the defendants with double measurements. These facts seem to us to conclusively establish the fallacious character of these estimates.

The excess in the estimates by reason of the estimator taking the diameter in the middle of the piece instead of one-third from the top, has already been alluded to. We cite as an illustration the testimony of Leonard Clewly,

Record, p. 762,

as to the diameter of a hypothetical piece 75 feet long, 12 inches at the top and 45 inches at the butt. His first estimate is clearly erroneous. Subsequently he corrects himself, giving the mean diameter as 28 inches, and stating that he arrives at it by adding the diameter of the top and butt together and dividing them by two. This, of course, is the same as measuring the piece in the middle. By this process he reaches a diameter of 28 inches, which in the stick in question, by reference to Scribner's table, gives 2,730 feet board measure. Contrast this with the testimony of Amos Burton,

Record, p. 745,

who gives the correct mean diameter for the same hypothetical stick at 23 inches, which, according to Scribner's table produces 1,767 feet board measure, and we find the excess of measurement on the basis of the erroneous diameter to be 963 feet, being an excess of more than 55 per cent. over the true measurement.

We have alluded to the careful correctness of the master's report and the exaggerated estimates given by the complainant's estimators, in order that the court might see the utter unreliability of their testimony and their numerous exaggerations in their estimates and computations, but we do not concede in the least that the complainant has any right to charge the defendants with any other or greater amounts than they themselves come forward and show, and this upon two grounds:

1. Because the decree specifically finds that the defendants are liable as mortgagees in possession. That liability is only the same as that of a provident owner.

And they are only chargeable with their actual receipts, unless they are shown to be guilty of some willful default, gross wrong or neglect, or of fraud.

1 Hillard on Mortgages, p. 418.
Beare vs. Prior, 6 Beavan R., p. 183.

2. In the case before the master, the defendants come forward under the decree with a clear, full and clean showing of all their receipts from the rents, issues and profits of the property. There is no direct attack made upon their statement. Neither is it sought to be impugned except indirectly by the testimony of these estimators, which has already been considered. According to their showing, for the present confining our attention to the stumpage, by their books and the bills of lading, as found by the master,

Record, p. 123.

they have cut and removed from the lands, stumpage in addition to the stumpage cut and removed by Merick, Fowler & Lyon in the aggregate amount of 27,915,529 feet, from which should be deducted, the amounts found by the master.

Record, p. 123.

Leaving the actual amount chargeable to the defendants as stated by the master in his report.

At the hearing the complainant's second exception was objected to before the court by the defendants, for the reason that it was not a proper exception, was too general and indefinite. Its language was "that said master has found that the said defendants cut from the lands found to belong to the complainant only the amount of 18,857,440 feet of timber, besides that sold to Merick, Fowler & Lyon, whereas he should have charged said defendants with 64,278,507 feet of timber, etc.

This is a most general objection to a general conclusion of the master based upon numerous specific facts found by him. It is not warranted by equity practice. Complainant should have excepted to each finding of fact on which the conclusion is based.

In *Story vs. Livingston, 13 Pet. R., p. 359*, it is held that exceptions to a master's report must state article by article

the parts excepted to, and that such exceptions are in the nature of special demurrers, and the party objecting must point out the errors.

Three reasons are given by the court for rejecting the method adopted, by which the master determined the amount of standing timber for which the defendants should account.

1. That there was no evidence that all of the lumber manufactured at Ossineke was shipped to Buffalo, and that, on the contrary, the master found it necessary to add to the amount received by the defendants at Buffalo, several items of timber and lumber sold and shipped to outside parties.

2. That the books of account were kept at Ossineke, and they have not been introduced in evidence by the defendants.

3. That complainant commenced this suit in 1872, and so stubborn has been the defense, that he did not get a hearing, and the cause referred to a master, until 1880.

Record, p. 203.

1. As to the first reason, we submit with deference that the court below was misled by the brief for complainant, and we ask the attention of the court to the fact that there is nowhere any testimony of any items of timber or lumber sold and shipped to outside parties except that of the defendant Cunningham, and that those items are shown by him to have gone upon the books of the Buffalo concern.

Record, p. 884.

Neither has the master added a foot of timber or lumber to the account stated by the defendants to have been received by them at Buffalo and elsewhere.

Record, pp. 123, 884, 885.

After the burning of the mill, in 1872, the defendants, through Cunningham, negotiated a few lots of lumber and

logs, testified to by him, with various parties, and these lots are adopted by the master in the precise amounts testified to by the defendant Cunningham, and no increase whatever is made thereto.

Record, p. 884.

Winchester, the bookkeeper at Ossineke, testifies,

Record, p. 831.

That he was bookkeeper for the firm at Ossineke; that he made the bills of lading introduced in evidence; that the said bills of lading presented to him, and identified by him on the witness stand, represented all the lumber shipped in 1869. On page 833 he says the same for the year 1870; on page 835 he says that the lumber was not measured at Ossineke, but at Buffalo.

Seaman, one of the inspectors at Buffalo, testifies,

Record, p. 532.

that he inspected five million feet of lumber at Buffalo called "Devil river lumber."

John Dale, a witness for the complainant says that they shipped their lumber without measurement; that the witness did not keep a record of shipments; that they sold the lumber to the yard at Buffalo.

Record, p. 325.

In Boynton's Buffalo testimony,
Burton, counsel for complainant, concedes that they never measured the lumber at Ossineke. The defendant, Cunningham, who was the general manager of the concern shows clearly that if any lumber had been sent from Ossineke to any point other than Buffalo he would have known it, and that all the lumber manufactured at Ossineke was consigned to the Buffalo firm and entered upon their books.

The court finds an increase of 29,729,928 feet over the amount found by the master's report.

We submit it is incredible that this amount—practically thirty million feet—of lumber could have been shipped from Ossineke to other points than Buffalo, and the complainant be unable to give affirmative evidence of one single outside shipment.

2. The uncontradicted testimony that the lumber was not measured at Ossineke disposes of the inference made by the court from the non-production of the Ossineke books, inasmuch as it shows that the books would not contain any evidence of the amount of lumber shipped.

These books were in the hands of Robinson, who was in open war with the Buffalo defendants, and in close league with Oliver. This same Robinson had written out for Oliver's counsel a statement of what he would swear to, and had furnished Oliver's counsel with all the documents and papers he could get.

Record, pp. 431–432.

Is it likely if the Ossineke books would benefit Oliver that his confederate (Robinson) would not have produced them?

3. The inference which the court seems to draw from the length of time that this suit has been pending, that the delay had been caused by the defendants, is conclusively negatived by the annexed abstract of calendar entries in the cause marked Exhibit "B."* From them it appears that the defendants themselves took the initiative in the matter of the taking of testimony, after the complainant had waited from 1872 to 1877 without taking a step. The only delays asked for by the defendants were: (1.) The one granted by the circuit judge under the provisions of the Bankrupt act, because, in violation of the terms thereof, the complainant

* Post, p. 109.

was proceeding against the defendants, Cunningham and Haines, at the same time in bankruptcy and in this suit. (2.) The application made to the court and decided on the day of the beginning of the hearing of this cause, based on the same objection on account of the bankruptcy proceedings.

There was no delay on the part of the defendants in the matter of taking proofs; but on the contrary, there was unusual dispatch, considering the number of witnesses and the various distances between their respective residences. If there was any needless delay, it was occasioned by the complainant. We submit it is manifestly unjust to charge the delay of eight years upon the defendants.

We contend further that it is not pertinent or material to the inquiry as to the amount of lumber that these defendants received, whether they stubbornly contested what they believed to be an unjust and exaggerated claim of complainant or not. We have never known that it was the province of a court of equity to give smart money or exemplary or vindictive damages.

The master, on the hearing under the reference before him, could not properly, and did not, consider the duration of the suit or the character of the defense. It was referred to him to take proofs and determine the amount of property which the defendants had received from the complainant; and we submit that, on the hearing before the court upon the exception of the complainant to the master's finding as to the amount of timber cut, the court is bound to consider no other evidence than that which could properly go, and did go, before the master.

Second.

But upon the basis upon which the court proceeded in its decree, we submit that there should be the following deductions made from the amounts found by the court. The total measurements of Oliver's estimators, as

found by the court, were 60,278,707 feet, from which the court deducts, by reason of measurement by an erroneous diameter, 3,283,317, and an additional deduction for one-third of the amount cut on sections 8, 9 and 17 of 2,815,000, also a deduction for measurements made on lands not in the decree of 1,450,462 feet; leaving 52,729,928 feet chargeable to the defendants. From this amount the court allows to the defendants on account of the Merick, Fowler & Lyon sale 22,000,000 feet. Whereas the testimony of Mr. Fowler and the statement submitted by him in connection therewith which he swears was made from the books (and which he knew to be correct), is that the amount of timber cut by them under that sale was 28,017,065. The court in the decree directing an order of reference to a master charged these defendants with the amount received by them upon said sale, declaring that the defendants sold and transferred to Merick, Fowler & Lyon all the pine timber remaining upon said lands amounting to 23,000,000 feet, at the price of two dollars per thousand. It affirmed said sale by charging the defendants with three-quarters of the proceeds thereof. The Merick, Fowler & Lyon contract is in evidence, and was before the court upon that hearing. From it there can be no dispute but that the sale to them carried all of the pine timber standing on said lands at the date thereof. No imputation has been cast upon the good faith or reasonableness of said contract, and the defendants are clearly entitled to have deducted from the gross amount of timber charged to them this amount of twenty-eight million and odd feet instead of 23,000,000. Upon the basis upon which the master proceeded in stating his account, it was unnecessary to arrive at the exact amount of timber cut by Merick, Fowler & Lyon, because he only charged the defendants with the lumber actually received by them as shown by their books, and added thereto the $46,000 paid

by Merick, Fowler & Lyon for the standing timber. But it seems too plain for argument that upon the basis upon which the court proceeds, charging the defendants with the amount Oliver's estimators testify they found to have been cut on these lands, it should deduct the actual amount of timber cut by Merick, Fowler & Lyon, instead of the 23,000,000.

The court in its deductions has allowed the defendants only 2,815,000 feet for one-third of the timber cut on sections 8, 9 and 17, of which Oliver owned but two-thirds. We suppose that the court adopted these figures directly from the master's report, but its attention was not called to the fact at the time that said deduction of 2,815,000 was very far below one-third the amount of timber testified to by Oliver's estimators to have been cut on said sections. It is manifest that as the court charges the defendants with the full amount of the measurements of Oliver on said sections this deduction should be one-third thereof.

The testimony clearly shows that of the 60,278,707 feet, reported by the complainant's measurement and adopted as the correct amount by the court, 15,126,708 was found on sections 8, 9 and 17, one-third of which would be 5,042,-236, instead of 2,815,000.

We annex hereto a table, marked Exhibit "A,"* showing this amount as the result of Oliver's estimates in detail.

Dividing these deductions as the court has divided the increased amount over and above the amount found by the master, the account would stand as follows:

The amount of deduction on account of the Merick, Fowler & Lyon sale, is, 5,017,065 feet, at $2 a thousand	$10,034 13
Three-fourths of which would be	7,525 59
One-fourth of this is	1,881 40

* Post, p. 108.

The total deduction with interest being as follows:

From August 1, 1869, the principal	1,881 40	
Interest	1,635 23	$3,516 63
From August 1, 1870, the principal	1,881 40	
Interest	1,503 54	3,384 94
From August 1, 1871, the principal	1,881 40	
Interest	1,371 85	3,253 25
From August 1, 1872, the principal	1,881 40	
Interest	1,240 16	3,121 56
Total, principal and interest		$13,276 38

On account of the deduction for the excess for timber cut, of which Oliver owned only two-thirds the amount of excess, is 2,227,237 feet, at $2 per thousand . . . . . $ 4,454 47

Three-fourths of which is 3,340 85

Divided between the years 1869, 1870, 1871 and 1872, on a similar basis on which the court has divided the increase over the master's report, the account will stand as follows:

From August 1, 1869, the principal	835 21	
Interest	725 91	$1,561 12
From August 1, 1870, the principal	835 21	
Interest	667 45	1,502 66
From August 1, 1871, the principal	835 21	
Interest	608 99	1,444 20
From August 1, 1872, the principal	835 21	
Interest	550 53	1,385 74
Total, principal and interest		$ 5,893 72

The decree should then stand as follows:

Amount found by the court in excess of master's report	$28,913 84
If the first deduction is allowed at	13,276 38
this amount will be reduced to the sum of	15,637 46
If the second deduction is allowed at the sum of	5,893 72
the amount of increase would be reduced to	9,743 74
Adding the amount found by the master, to wit:	12,504 83
the decree would be for	22,248 57
In case the Merick, Fowler & Lyon deduction only should be allowed, the amount of the decree would be	28,142 29
In case the one-third Oliver land deduction only is allowed, the amount of the decree would be	36,524 65

The Ninth Assignment of Error

is based upon the overruling of the defendants' (first) exception (Record, p. 200) to the finding of the master that Oliver and Robinson got out in the winter of 1867 and 1868, 7,800,000 feet of logs. The effect of this finding is to charge the defendants with said 7,800,000 feet as a part of his computation, which results in his finding logs on hand and transferred to Cunningham September 8th, 1868, 4,534,122. The master's computation is found on page 112 of the Record, but for convenience of reference is here repeated:

COMPUTATION.

	Feet.
Oliver & Hawkins logs	3,400,000
Oliver & Robinson's logs got out by jobbers	7,800,000
McArthur logs	300,000
DeGrout logs	100,000
Total	11,600,000

Sawed and shipped in 1867	2,200,000
Shipped and sold, to June 9, 1868	2,352,316
Shipped from June 9 to August 18, 1868 . .	1,913,563
On dock September 8, 1868	600,000
Total	7,065,878
Logs as above	11,600,000
Lumber as above, shipped, etc.	7,065,878
Logs on hand September 8, 1868	4,534,122

The only objection to the correctness of this is to the item of "Oliver & Robinson's logs got out by jobbers" in winter of 1868 and '9, which is stated at 7,800,000, being an excess on the actual amount of 800,000 feet. This finding of the master is made, as he says,

Record, p. 112,

"with some doubts" which he says "arise mainly from the fact that the complainant in his original cross-bill says that Oliver & Robinson got out 7,000,000 feet of logs, and this statement is confirmed by the testimony of another of the jobbers, one of the complainant's own witnesses, Robert Robinson, who pretends to testify of his own knowledge that 7,000,000 feet were got out." The master refers to the testimony of three jobbers of the complainant's, namely, said Robert Robinson,

Record, vol. 2, p. 1283,

McArthur,

Record, vol. 2, p. 1238,

and Samuel Ellsworth,

Record, vol. 2, p. 1274.

McArthur testifies from hearsay as to what the figures were put in at!

See p. 1289, vol. 2, printed Record.

Samuel Ellsworth testifies of his own knowledge only from his own scale, although he says he saw Van Buren's

scale and also the scale of Ellsworth Brothers. The other camp is a guess on his part, and he only estimates roughly that there were between seven and eight million.

See pp. 1274 and 1275, printed Record.

Ranney's inventory in the spring of 1869 was only between 500,000 and 700,000 feet.

See Ranney's deposition, printed Record, p. 1056.

The only camps were those of Ellsworth and Price, Duncan McKay, Ellsworth and Robinson and Dougald McArthur.

Melville's testimony, Record, vol. 2, p. 1318.

Upon such mere guess-work testimony the master increases the amount of logs got out in 1868–9, 800,000 feet over the amount sworn to by the complainant in the summer of 1869—when all the facts were well known to him and fresh in his memory.

Of this scale part was made by Leach, who could not read or write.

The Tenth Assignment of Error

is upon the overruling of the defendant's (second) exception,

Record, p. 200,

to the finding of the master as to the amount and value of the machinery.

The master charged defendants with four boilers of the value of $3,200, when there was no evidence that they were disposed of by the defendants. He expressly finds, in his report, that there was no such evidence as to mill machinery,

Record, p. 124,

but he assumes to treat these boilers as personal property.

The language of the decree was "Three-fourths of such of the mill machinery as has since been disposed of."

There is no evidence to sustain this finding of the master.

The only testimony approaching materiality is that of Mr. Cunningham. This shows that George J. Robinson bought the balance of the personal property and burnt machinery after of the fire, for the sum of $9,000, and that about half the property sold was personal property and one-half burnt machinery,

Record, p. 897.

But there is no proof from which the master can estimate, or even guess, what amount of one-half of $9,000.00 was for burnt machinery *which was on hand at the time of the transfer from Oliver to Cunningham and included in the bill of sale.* The testimony and *Oliver's bill of sale* shows that at the time of the transfer from Oliver to Cunningham there was no gang, only four boilers, and but one engine, while the testimony of Mr. Ranney is to the effect that the new organization put about $30,000.00 on the mill in machinery and improvements, and that they practically built the mill over—built on a wing, put in four new boilers, put in a larger engine, put in a gang, and other general improvements, including shafting, belting, etc., amounting in cost to about $30,000.

Record, pp. 1056, 1057.

As the only basis of a claim against these defendants, under this decree, is for the proceeds of such machinery as they are proven to have received from Oliver, and to have disposed of after the fire, it is too clear for argument that the complainant has failed to make any case within the terms of the decree.

The Eleventh Assignment of Error

is based upon the overruling of the defendants' (third) exception (Record, p. 200), to the allowance by the master of a charge for the value of the use of the mill by the defendants.

With reference to this finding the master frankly states that it is not included in the reference, and he does not find it thereunder, but he says he has included a charge against the defendants for such use, respectfully submitting to the court the propriety of such an allowance.

See Master's Report, Record, p. 116.

We insist that the master is bound by the terms of the decree, and that the court below was also bound. The court had no power after all the testimony was taken and the proofs closed to change the decree rendered May 27th, 1880, of which the complainant had never complained. The master clearly erred in this finding, the testimony shows that more than one-half of the mill machinery and the valuable and serviceable part of the mill belonged to the defendants.

Record, p. 1056.

If the defendants should be charged anything, it should not be at a higher rate then 25 cents per thousand, because 50 cents per thousand is the highest price to which anyone testifies, as found by the master in his report.

Record, p. 116.

The Twelfth Assignment of Error

is based upon the overruling of the defendants' (fourth) exception (Record, p. 200), to the allowance by the master of a charge for the use of the mill property after the fire. It is obnoxious to the same objections, pointed out under the 6th assignment of error; that this item is not included in the reference, and that the court could not enlarge the decree so as to include it after the proofs were closed under the reference.

In addition, we submit that there is no testimony whatever that defendants ever received anything from the use of the mill property after 1872.

Cunningham's testimony, Record, p. 905,

shows that no rental or profit was received from anyone therefore. The case falls within the ruling of

Peugh vs. Davis, 113 U. S. R., p. 542.

Again, in 1874, directly after the fire, all the standing timber was sold to Merick, Fowler & Lyon, and defendants are charged with the full price received therefor, and with interest from that date. The use of the property therefore could not be of any value to them. There is no competent evidence of what the value was.

The Thirteenth, Fourteenth, Fifteenth and Eighteenth Assignments of Error

are based upon the overruling of the fifth, sixth, seventh and tenth exceptions taken by the defendants to the report of the master, and can be conveniently considered and argued together.

The defendants claimed to be entitled to credit for the debts found by the master in his report, at the top of page 128 of the Record, to have been paid by the defendants. He also finds that, standing by themselves, they are just and proper allowances in favor of defendants.

But he disallows them,

1st. Because of the "George J. Robinson financial account" and "the Henry M. Robinson disbursement account;" and, 2d, because he finds that the proceeds of seven cargoes of lumber shipped by Oliver & Robinson prior to Sept. 8th came to the hands of the defendants.

That these debts came fully within the terms of the

allowance decreed by the court to be made by the master is conceded.

We submit that their disallowance is improper, and unwarranted by the evidence.

The statement of the origin and continuance of the George J. Robinson financial account and the Henry M. Robinson disbursement account, as given in the report of the master,

Record, pp. 131–134,

is substantially correct.

The decree directed the master to charge the defendants with three-fourths of the amount realized by them on notes and accounts due to Oliver & Robinson and transferred to Cunningham, if any.

20 paragraph of decree, Record, p. 105.

In no just sense was the Geo. J. Robinson financial account due to Oliver & Robinson. It was not a debt due to the firm. The balance of this account did not represent so much actual indebtedness. It was only a factor in the sum which might be found due to or from Robinson on final settlement of the partnership, and that balance, when thus ascertained, would not be a debt due to the firm, but a debt due from one partner to the other. Possibly it was a fraud upon Oliver, perpetrated by his now confidential friend and swift witness, Robinson, but Oliver, at the time, knew nothing of it, and the appellants knew nothing of it. It speaks of transactions *before* appellants had anything to do with the concern.

No benefit, issue or profit ever came to appellants' hands out of this matter, and of course there is nothing for them, as mortgagees in possession, to apply. The master wholly overlooks the ground on which alone the appellants can be charged. There is, moreover, no proof that the Robinsons turned over these balances, or any part thereof, to the

defendants, after the transfer by Oliver to Cunningham was made. Yet the master charges the defendants with the entire balance. The Geo. J. Robinson financial account shows that he received, after Sept. 8, 1868, $2,714.92, while he paid out during the same time, $3,629.13. Thus, in any event, reducing the balance, $12,584.74, by $914.21. The H. M. Robinson disbursement account is only charged, for Sept. 8, 1868, with $325, and this charge is a mere transfer entry from the Geo. J. Robinson financial account.

The master *assumes* that the balances were all collected in money, and that all the money received by the Robinsons was appropriated to the use and benefit of the defendants. We say "assumes" because there is absolutely no evidence to this effect. No one swears to it, not even the swift witness, Geo. J. Robinson.

Again, the account itself, and the journals on which the master takes it, shows no receipt of the balances, nor any part thereof, and the master says distinctly there is no testimony that the defendants ever received any part of these assets.

See Master's Report, Record, p. 134, foot.

It is true that he makes this statement with the reservation, "except as the inference may be drawn from the circumstances of the case;" but we submit that no inferences are allowed to be drawn "from the circumstances of the case," which the facts proved would not warrant, and there is no proof of any fact justifying this inference. Summed up as strongly as possible, from the testimony on behalf of complainant, the evidence only proves the existence of these accounts on the books of Oliver & Robinson, and the amount of their apparent balances on Sept. 8, 1868. There is no testimony whatever as to the correctness of said balances. We submit, that as to these appellants, mere unsworn entries in the books of Oliver & Rob-

inson, unsupported by any extraneous proof, cannot, in this case, be deemed evidence.

As to the George J. Robinson financial account. He was a partner in the firm of Oliver & Robinson, and the amount of his indebtedness to Oliver (no matter what the balance of this financial account may appear to be) can only be settled by an accounting between him and Oliver respecting the affairs of Oliver & Robinson's partnership. In this connection we call attention to the errors of the master in his statement of the proceeds of the cargoes received by the defendants.

As to the cargo of the Allen, shipped July 28, 1868,

Master's Report, Record, p. 128,

it is true that L. W. Tinker & Co. were paid $1,475.21, but $1,000 of it was paid in a note dated August 14th, 1868, and said note was additional indebtedness of Oliver & Robinson outside of the $4,143.19, payment of which is claimed by defendants.

(See L. W. Tinker's statement of account in evidence.)

Defendant should only be charged with $475.21, and the amount paid Bickford, $156.

The cargo of the steamer Dubuque was shipped June 27th, 1868.

The cargo of the schooner J. C. Ward was shipped August 7th, 1868.

The cargo of the schooner American Champion was shipped August 18th, 1868.

On page 168 of Oliver & Robinson's journal, A. Bates is charged and mill earnings and expenses are credited with $4,351.66, and the accountant Boynton is of the opinion that said credit is from the above cargo.

The proceeds of the cargo of the schooner Rio Grande, which was shipped August 8th, 1868, $983.77.

The cargo of the steamer Clement, which was shipped July 22d, 1868, $495.65.

The cargo of the schooner American Champion, which was shipped July 29th, 1868, $2,029.54.

Aggregating $3,508.96.

On page 170 of Oliver & Robinson's journal is found the following entry:

A. Bates,	Dr.	$3,508 96
Harmon & Croul	. . . . .	3,508 96

Showing very clearly that the defendants never received this amount nor any part of it. Taken in connection with the following entries on the journal, wherein Geo. J. Robinson's financial account is charged and A. Bates is credited as follows:

June 2d, 1868 (p. 65), ...	$2,597 02
July 17, 1868 (p. 77), ...	1,000 00
Aug. 13, 1868 (p. 130), ...	5,097 23

It is conclusive evidence that Oliver & Robinson were indebted to said A. Bates, and that this lumber was all paid for to Oliver & Robinson. It is true that George J. Robinson's financial account is credited, and Bates is charged July 23, 1868, on page 126, with $2,856.45, and the account does not balance; but it appears from the account that these cargoes were not all shipped to Bates, and of course we cannot unravel all the details. Sufficient appears to show that the defendants are not chargeable. It further appears from the journal that the A. Bates money is a large part of Geo. J. Robinson's financial account, and that the defendants are charged with the entries in both accounts, while there is no evidence that they ever received the amounts named in the accounts. On page 47 of the master's report he speaks of the defendant having received $683.94 of ~~B. Gaither & Co.~~ as a balance due on the following cargoes:

Record p. 131
P. Gilcher

Morning Lark, May 30, 1868.
The Emily, June 11, 1868.
The Carrington, July 3, 1868.
The Dolphin, Aug. 3, 1868.

We are unable to find anything in the journal tending to show that the defendants received this amount, and we do not believe there is any testimony to support this finding.

Again, if the defendants are charged with the above noted entries, they should have been consistently credited with the payment of $3,152.60 to the credit of Price & Blanchard, charged to mill earnings and expenses under date of October 7, as it is obvious that the mills never earned that amount after the 8th of September.

We annex a tabulated statement of the account between the complainant and the defendants, as it should appear after the foregoing corrections and emendations, marked Exhibit "C."

Finally we insist that, for the reasons above stated, the decree below should be reversed with costs, and the cause be remanded to the court below to dismiss the bill of complaint.

HENRY M. DUFFIELD,
Attorney for Appellants.

GEORGE F. EDMUNDS,
Of Counsel.

EXHIBIT "A."*

Statement of Oliver's Estimates of Timber on Sections 8, 9 and 17, one-third of which he never owned, and one-third of which Timber is to be deducted.

Record, pp. 721, 722, A. B. Crowell's testimony.									
"	Sec.	17,	T.	29,	R.	8	E.,	White Pine....	1,873,549
"	"	8,	"	"			"	....	198,118
"	"	17,	"	N.,			Norway Pine.....		1,072,457
"	"	8,	"	"			"	.....	73,729
									3,217,853
Record, p. 756–8, Leonard Clewly.									
"	Sec.	8,	T.	29,	R.	8	E.,	White Pine.....	2,725,112
"	"	9,	"	"			"	.....	516,785
65	"	8,	"	"			Norway Pine.....		1,978,930
"	"	9,	"	"			"	.....	633,627
									5,854,454
Record, pp. 735, 736, 737, Albert E. Buchanan.									
"	Sec.	17,	T.	29,	R.	8	E.,	White Pine....	617,495
"	"	"	"	"			Norway		275,342
"	"	8,	"	"			White.....		344,733
"	"	"	"	"			Norway		155,710
"	"	"	"	"			"	1,035,990	
"	"	"	"	"			White.....2,392,229		
"	"	9,	"	"			"	.....	26,085
"	"	"	"	"			Norway		27,764
"	"	"	"	"			White.....		434,797
"	"	"	"	"			Norway		492,750
"	"	"	"	"			White.....		155,760
"	"	"	"	"			Norway		95,711
									6,054,386
								Total.....	15,126,713
One-third of total of Norway and White pine on Secs. 8, 9 and 17.....									5,042,287
Number of feet allowed by the court.									2,815,000
Balance claimed by the defendants.....									2,227,287
At $2.00 per thousand equals.....									$4,454.47
Three-fourths equals.....									$3,340.85

* See ante, p. 90.

EXHIBIT "B."*

Abstract of Calendar Entries.

1873.	
March 12.	Bill of complaint filed.
May 26.	Affidavit for order to bring in absent defendants and orders therefor filed.
June 7.	Subpœna returned, served on Geo. J. and H. M. Robinson on May 27, 1873.
July 7.	Appearance of defendants entered.
Sept. 3.	Answer of Cunningham, Geo. J. and H. M. Robinson, Calvin Haines and Philip M. Ranney, and plea of defendants Hunt and Eschleman.
Oct. 1.	Replication to pleas and answers of defendants.
1875.	
Jan. 22.	Hearing of the issue on the plea of Hunt and Eschleman.
Feb. 16.	Joint and several answer of Hunt and Eschleman filed.
Feb. 27.	Replication filed to said answer.
1877.	
May 7.	Order made by consent of counsel for taking of testimony, complainant 3 months, defendants 2 months, and complainant 1 month thereafter.
Oct. 15.	Note of issue for November term, 1877, filed.
1878.	
Feb. 16.	Note of issue for March term, 1878, filed.
March 18.	Leave granted complainant to file supplemental bill, and that subpœna issue to Merrick, Fowler & Lyon.
July 15.	Answer to supplemental bill filed.

*See ante, p. 87.

Oct. 7.	Order entered discontinuing supplemental bill on payment of costs.
Oct. 21.	Note of issue for November term, 1878, filed.
1879.	
June 6.	Order that proceedings against defendant be stayed.
1880.	
Jan. 17.	Petition of Garrett B. Hunt filed for stay of proceedings.
Feb. 9.	Stipulation for hearing said petition filed.
Feb. 9.	Decision of Judge Withey upon petition filed.
Feb. 12.	Note of issue for March term.
March 8.	Petition of Calvin Haines and Cunningham for stay of proceedings, answer of Oliver to the above, and order denying the same, March 8th and 9th.
March 8.	Case heard on pleadings and proofs.

EXHIBIT "C."

The final balance as per master's report, including interest up to June 11, 1880, . .	$12,504 83
As against this the defendants are entitled, if their first exception is sustained to an allowannce on 800,000 feet of logs at $5 per thousand feet (the difference between the value of logs and stumpage as found by the master) $4,000, three-quarters of which is . .	3,000 00
Interest from September 8, 1868, to June 11, 1880, 11 yrs. 9 mos. 3 ds.	2,469 25
Second exception, if sustained.	
To an allowance for four boilers charged at $3,200, three-quarters of which is . .	2,400 00
Interest 11 yrs. 9 mos. 3ds.	1,975 40

Third exception, if sustained.	
To an allowance 15 cents per thousand on saw bill of 1869, 3,964,577 feet at 15 cents, $594.69, three-quarters of which is . .	$446 01
Interest from August 1, 1869, to June 11, 1880, 10 yrs. 10 mos. 10 ds.	339 08
Saw bill of 1870, 5,604,498 feet, at 15 cents, $740.67, three-quarters of which is . .	555 51
Interest from August 1, 1870, to June 11, 1880, 9 yrs. 10 mos. 10. ds.	383 45
Saw bill of 1871, 3,563,505 feet, at 15 cts, $434.53, three-quarters of which is . .	325 87
Interest from August 1st, 1871, to June 11, 1880, 8 yrs. 10 mos. 10 ds.	202 11
Saw bill of 1872, 4,341,474 feet, at 15 cts, $661.52, three-quarters of which is	488 40
Interest from August 1, 1872, to June 11, 1880, 7 yrs. 10 mos. 10 ds.	264 76
Fourth exception, if sustained.	
To an allowance for use of property for 1873, as charged by the master at $500, three-quarters of which is	375 00
Interest from Dec. 31, 1874 to June 11, 1880, 6 yrs. 5 mos. 11 ds.	169 23
To an allowance for use of property for 1874, as charged by the master, $500, three-quarters of which is	375 00
Interest from December 31, 1874, to June 11, 1880, 5 yrs. 5 mos. 11 ds.	142 98
To an allowance for use of property for 1875, as charged by the master, at $500, three-quarters of which is	375 00
Interest from December 31, 1875, to June 11, 1880, 4 yrs. 5 mos. 11 ds.	116 73
To an allowance for use of property for 1876, as charged by the master, at $500, three-quarters of which is	375 00

Interest from December 31, 1876, to June 11, 1880, 3 yrs. 5 mos. 11 ds.	$90 48
To an allowance for use of property for 1877, as charged by the master, $500, three-quarters of which is	375 00
Interest from December 31, 1877, to June 11, 1880, 2 yrs. 5 mos. 11 ds.	64 23
To an allowance for use of property for 1878, as charged by the master, $500, three-quarters of which is	375 00
Interest from December 31, 1876, to June 11, 1880, 1 yr. 5 mos. 11 ds.	37 78
To an allowance for use of property for 1879, as charged by the master, at $500, three-quarters of which is	375 00
Interest from December 11, 1879, to June 11, 1880, 5 mos. 11 ds.	11 73
To an allowance for use of property for 1880, 6 mos. and 10 ds. as charged by the master, at $221.21, three-quarters of which is . .	156 65
Fifth, sixth and seventh exceptions, if sustained.	
To an allowance for the payment of E. and G. R. Haines' chattel mortgage, $2,000, three-fourths of which is	1,500 00
Interest from Apr. 23, 1868, to June 11, 1880, 12 yrs. 1 mo. 18 ds.	1,274 00
G. S. Wormer & Sons, $106.63, three-fourths of which is	79 97
Interest from Jany. 12, 1869, to June 11, 1880, 11 yrs. 4 mos. 29 ds.	63 92
Croul Brothers, $156.16, three-fourths of which is	117 12
Interest from Jany. 5, 1869, to June 11, 1880, 11 yrs. 5 mos. 6 ds.	93 72

Buhl & Ducharme, $1,028.93, three-fourths of which is	$771 69
Interest Jany. 5, 1869, to June 11, 1880, 11 yrs. 5 mos. 6 ds.	617 59
Eckard & Co, $640, three-fourths of which is	480
Interest from Aug. 2, 1868, to June 11, 1880, 11 yrs. 10 mos. 9 ds.	398 43
John E. Kitten, $485.45, three-fourths of which is	364 08
Interest Apr. 10, 1869, to June 11, 1880	282 46
Oliver & Robinson's note, $957.94, three-fourths of which is	718 44
Interest from Nov. 10, 1868, to June 11, 1880, 11 yrs. 7 mos. 1 d.	582 67
Oliver & Robinson's note, $656.40, three-fourths of which is	492 30
Interest from Nov. 12, 1868, to June 11, 1880, 11 yrs. 6 mos. 20 ds.	398 92
L. W. Tinker & Co., $4,143.19, three-fourths of which is	3,107 37
Interest Sept. 18, 1868, to June 11, 1880, 11 yrs. 8 mos. 23 ds.	2,334 03
Detroit Safe Company, $215, three-fourths of which is	161 25
Interest from Apr. 10, 1869, to June 11, 1880, 11 yrs. 2 mos. 1 d.	126 10
Richmond & Backus, $42.47, three-quarters of which is	31 86
Interest from April 10, 1879, to June 11, 1880, 11 yrs. 2 mos. 1 d.	24 91
Standart Brothers, $33.00, three-quarters of which is	24 75
Interest from November 23, 1868, to June 11, 1880, 11 yrs. 6 mos. 18 ds.	20 17

Gray & Toynton, $37.36, three-quarters of which is	$27 93
Interest from February 19, 1869, to June 11, 1880, 11 yrs. 3 mos. 22 ds.	22 10
Donald McRae, $235.00, three-quarters of which is	176 25
Interest from January 29, 1869, to June 11, 1880, 11 yrs. 4 mos. 16 ds.	141 40
Meade & Townsend, $869.00, three-quarters of which is	651 75
Interest from June 25, 1869, to June 11, 1880, 10 yrs. 11 mos. 16 ds.	499 04
Eaton & Son, $1,000.00, three-quarters of which is	750 00
Interest from June 25, 1869, to June 11, 1880, 10 yrs. 11 mos. 16 ds.	627 95
C. & P. Muller, $212.50, three-quarters of which is	159 36
Interest from January 6, 1869, to June 10, 1880, 11 yrs. 5 mos. 5 ds.	127 49
Eighth exception, if sustained.	
To an allowance for the payment of C. Haines & Co., chattel mortgage, $1,674.21, three-quarters of which is	1,255 65
Interest from April 23, 1868, to June 11, 1880, 12 yrs. 1 mo. 23 ds.	1,066 33
Ninth exception, if sustained.	
To an allowance for the payment of H. M. Robinson mortgage, $2,000, three-quarters of which is	1,500 00
Interest November 26, 1867 to June 11, 1880, 12 yrs. 6 mos. 15 ds.	1,316 87
Tenth exception, if sustained.	
To an allowance for the payment of Isadore Kauffman, $1,082.75, three-quarters of which is	812 07

Interest November 4, 1871, to June 11, 1880, 8 yrs. 7 mos. 7 ds.	$487 01
Oliver & Robinson's pay-roll for August, 1868, $1,612.61, three-quarters of which is . .	1,209 45
Interest from September 8, 1868 to June 11, 1880, 11 yrs. 9 mos. 3ds.	993 47
	$35,196 54

CONTRA ACCOUNT.

For part of proceeds of cargo of schooner "Allen," shipped by O. & R., July 28, 1868, to wit:

September 13, 1868, to pay R. K. Bickford	$156 00
" " " L. W. Tinker & Co.,	375 21
Interest from September 13, 1868, to June 11, 1880	518 90
	$1,050 10
Three-quarters of which is	787 59

RECAPITULATION.

Dr.	$35,196 54
Cr.	787 59
Balance	$34,408 95
Amount of balance as found by master . .	12,504 83
Balance due defendants, as of date of June 11, 1880	$21,904 12

118-241

FILED.
MAR 25 1886
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States.

October Term, 1885.

GARRETT B. HUNT, and
JACOB ESCHELMAN,
Defendants below, with several others not appealing,
Appellants,

vs.

DAVID D. OLIVER,
Complainant below and Appellee.

Appeal in Equity from the U. S. Circuit Court, for the Eastern District of Michigan. Withey, J. of the W. D. sitting.

Brief for Appellee.

This cause is substantially a bill to redeem, and the complainant prevailed below.

No legal question of any doubt or difficulty is involved.

The determination depends wholly upon the facts.

In brief outline the case is this:

Oliver owned a large amount of pine lands in Michigan, and borrowed upon them thirty-five thou-

sand dollars from the appellants, Hunt and Eschelman, jointly with one Cunningham, Hunt's son-in-law, (who with others was a defendant below, and did not appeal,) all of Erie Co., N. Y. Oliver became embarrassed and the mortgagees procured him to convey the mortgaged lands, and all the rest of his property, without consideration, to Cunningham, one of their number; Oliver intending, in good faith, that they should sell, reimburse themselves, and give him back the surplus; the mortgagees intending, in bad faith, to secure the whole for themselves.

As in *May vs. LeClaire*, 11 Wall., 229, middle of page; *Babcock vs. Wyman*, 19 How., 289, S. C. Curtis' C. C. and *Emerson vs. Atwater*, 7 Mich., 12; no condition or trust was expressed.

The mortgagees subsequently, with other creditors who participated in their fraud, and became vendees of Cunningham, formed a partnership to which the mortgagees contributed the mortgage as their capital, and the other creditors their claims as their capital, and a foreclosure was had, and the property bought in by Hunt, one of the mortgagees, and the partnership carried on lumbering operations on the property.

The court below granted the relief prayed and ordered an accounting, payment of $41,000, and conveyance; following the above cases, and *Russell* vs. *Southard*, 12 Howard, 154; *Pugh* vs. *Davis*, 96 U. S., 337; and *Villa* vs. *Rodriquez*, 12 Wall, p. 339, where this court says: "The law upon the subject of the right to redeem, where the mortgagor has conveyed to the mortgagee the equity of redemption, is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which gov-

ern where a sale by a *cestui que trust* to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hope; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of "the instrument employed is immaterial." That the "mortgagor knowingly surrendered, and never intended to reclaim is of no consequence. If there is vice in the transaction the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law."

No assignment of errors was annexed to the writ of error, as required by sec. 997, R. S., U. S., and under par. 4, R. 21, of this court, counsel for appellants may not be heard. 104 U. S., 385.

It is supposed that the main reliance of the appellants is upon the defense of the *res adjudicata* by the foreclosure (of which, hereafter,) but it is also supposed that the appellants wish to claim here, as they did below, that they were not connected with the operations of Cunningham and the other confederates.

And this is the main question of fact in the case; whether Oliver's conveyance to Cunningham was for

the joint benefit of himself and his co-mortgagees, the appellants; whether the combinations of persons and events, showing the appellants to have been co-conspirators, were purely accidental, or whether there was contrivance and design; that is, whether each part of the testimony is so connected with the whole as, taken together, to furnish satisfactory proof that the result actually reached was originally contemplated by all the parties defendant, and particularly by the two appellants, who, holding the said first incumbrance, were essential parties to any fraudulent mode of handling the property adversely to Oliver.

Before collating the evidence on this question, however, we present an abstract of the pleadings.

This litigation began in the filing of a cross-bill to the foreclosure in 1869. That bill was dismissed, without prejudice, and the present bill was filed thereupon, in 1873. From the fact that the judge of the eastern district was once of counsel for complainant, and other causes, great delay arose and seventeen years in the courts have now elapsed since the complainant took steps in 1869, to remedy the injustice he had suffered.

ABSTRACT OF THE BILL OF COMPLAINT.

1. On the 17th of November, 1866, complainant, of Ossineke, Alpena Co., Mich., was indebted to Hunt, Eschelman and Cunningham, of Buffalo, N. Y., for the purchase money of some of the lands described in Schedule "A," and with his wife, gave to them, a mortgage for $35,000 on the lands in Schedule "A."

2. At that time, Oliver owned those lands, and other lands in Alpena, Alcona and Cheboygan Counties, Michigan, and had the equitable title to still

other lands, of which David Preston, banker, of Detroit, held the legal title, as security for the payment of $10,000, and interest.

The Devil River flows through a portion of these lands, and at its mouth, Oliver had erected a saw mill propelled by water, and had erected valuable improvements pertaining to the saw mill.

3. During 1867, Oliver erected a steam saw mill on an adjoining portion of his land, near the mouth of Devil River. The mill with its engines and boilers cost $25,000. Other appurtenances connected with the mill cost $8,000, and there were also on the lands five dwelling houses, two barns, a blacksmith shop, a carpenter shop, store and store house. The lands were pine timber lands, accessible from the river, and there was a dam forming a reservoir for retaining logs.

4. The water mill was worth $6,000, the steam mill $30,000, the mill-sites and improvements $13,000, the pine lands $160,000.

5. After making the mortgage, and making the improvements mentioned, Oliver continued to manufacture lumber, at the mills, first alone, and afterwards with partners, first with George W. Hawkins, and lastly with defendant George J. Robinson, son of defendant, Henry M. Robinson, who furnished George his capital; and during this time, Oliver and his partners became indebted to defendant, Haines and Ranney, and also to E. &. G. R. Haines, and to James B. Wayne. and James H. Hill, in debts, all of which were secured by mortgages upon the lands of complainant; that in the spring of 1868, in consequence of said indebtedness, complainant had become embarrassed, and dissatisfaction grew up be-

tween complainant and George J Robinson, who with his father, then desired to get Oliver out of the business.

6. In June, 1868, Oliver applied to Hunt and Cunningham, on behalf of themselves and Eschelman, to obtain assistance, and wrote them a letter, (Schedule "C.") And in July, 1868, Oliver visited Hunt and explained to him his difficulties.

That Cunningham was Hunt's son in law; Eschelman was a friend of many years standing of Hunt, and Hunt was the monied business man of the three mortgagees.

And the three were jointly interested in the $35,000 mortgage.

7. When the three mortgagees learned of Oliver's difficulties, they formed a design to obtain all of Oliver's property, which had been steadily rising in value, since he had acquired it.

8. As the first step, they met at Buffalo, took legal counsel, and Cunningham pretended to execute an assignment to Hunt and Eschelman of his interest in the mortgage; this was a mere form, and made no change in the actual relation of the parties to each other. There were no negotiations as to price, no price fixed or money paid or agreed to be paid or secured to be paid, and the assignment was not completed for record until the thirteenth day of November, and was not recorded until the following January, and knowledge of its existence was concealed from complainant.

9. Cunningham immediately, in pursuance of this design, went to Ossineke, and took, without paying any consideration therefor, deeds of all of

Oliver's real property, and bills of sale of all of his personal property. That in taking these transfers, Cunningham in reality was acting as mortgagee in behalf of himself and his co mortgagees, and was acting with their authority; that Oliver believed him to be acting for himself, and Hunt and Eschelman jointly; that Oliver also assigned the Preston contract to Cunningham without consideration, and a mortgage for $20,000 against George J. Robinson, and his (Oliver's) interest in the personal property of the firm of Oliver & Robinson.

10. Cunningham refused to give to complainant a writing explaining the transaction, but complainant understood it to be substantially like that proposed in his letter of June 9th; but that in a previous suit, brought by Hunt and Eschelman, to foreclose the $35,000 mortgage, wherein Oliver filed a cross-bill, Cunningham claimed he took the transfer for the purpose of making a favorable sale, and the court substantially so found, and complainant therefore alleges, such was the purpose.

11. Cunningham returned to Buffalo and informed his co-mortgagees of his doings.

12. Cunningham, having obtained the legal title, for a fraudulent purpose, concerted with the other defendants, and planned a nominal sale to Robinson, Haines and Ranney, in which sale he and his co mortgagees were to be actually interested, and the property was to be operated for their common benefit. To make the plan successful, they desired to obtain complainant's assent to the sale.

13. They summoned complainant to Buffalo, and a meeting of all the mortgagees, and Robinson, Haines

and Ranney, who had been in communication as early as July, 1868, was held at Buffalo. At this meeting a sale to Robinson, Haines and Ranney was urged by the three mortgagees. Oliver was willing that Cunningham should sell to disinterested parties who should assume all of Oliver's liabilities, provided he should not in a reasonable time make a more advantageous sale. But Cunningham insisted that complainant should pay large sums within thirty days, or allow the deed to be made, upon terms that would suit the conspirators, and complainant was obliged to consent that Cunningham might execute an agreement as follows:

Complainant was to have thirty days to sell the property, and if he did not do so, then Cunningham was to sell to Robinson, Haines and Ranney, and the purchasers were to pay the Cunningham, Hunt and Eschelman mortgage, the mortgage to Wayne, the mortgage to C. Haines & Company, and their claims, half the E. & G. R. Haines mortgage, the claim of J. H. Hill, and release George W. Hawkins from all his liabilities growing out of his partnership with Oliver, and pay all of the firm debts of Oliver & Robinson. When this was done, Cunningham might deed to Robinson, Haines and Ranney, all the land deeded to him by complainant and David Preston, in towns 28 and 29 north of range 8, east, and was to deed to Oliver all the lands outside of those towns, and return the personal property.

14. Complainant left Buffalo before the agreement was reduced to writing, and Cunningham made a different contract called the "Buffalo agreement," by which the purchasers were not to assume these

claims, or any of them, except one half the mortgage to E. & G. R. Haines, and were to take the property subject to other claims which were already liens upon it, and subject to the partnership indebtedness of Oliver & Robinson, and were to pay the mortgages given by Hawkins to the Haines. And complainant was left personally liable for all said debts.

15. On the 13th of November, 1868, by a deed dated the 3rd of October, 1868, Cunningham conveyed the property to Robinson, Haines & Ranney. The grantees gave no consideration for the property, nor did they pay or procure to be discharged any of Oliver's liabilities, or of Hawkins' liabilities.

16. The grantees formed a partnership to manufacture lumber upon the property, and in January following, Cunningham acting for himself and Hunt and Eschelman, became senior member of the partnership, without putting in any capital; George Robinson represents himself and his father, and said partnership has been carried on ever since.

17. The partners have treated the property as unencumbered, and have not made any arrangements with the various mortgagees to pay either principal or interest, but that said principal and interest has been actually paid by the profits accruing to their representative, Cunningham.

18. After the formation of the partnership, Hunt, Eschelman and Cunningham, acting through Hunt, who paid the consideration, procured the Preston lands, and took a deed to Cunningham, and acting through Hunt, procured new machinery for use on the premises; and procured the assignment to Hunt & Eschelman, of the mortgage given to Haines and Ranney, and

of the mortgage given to E. & G. R. Haines; and procured the assignment to Henry M. Robinson, of the mortgage given to Wayne.

19. That there were certain "so-called Thompson lands," in which it was supposed complainant had an interest, but in which he really had no interest, and complainant, the day before the "Buffalo agreement," agreed to quit claim these lands to Robinson, Haines & Ranney, and the day before Cunningham deeded to Robinson, Haines & Ranney, he induced complainant to make such a quit-claim deed by refusing to release any of the outside lands unless it was done. At this time complainant was ignorant of the deception that had been practiced upon him.

20. Recapitulation and statement of the legal effect of the acts of defendants, and of complainant's rights, with a profert of the payment of any money which may be found due to defendant on the mortgages.

PRAYER.

1. That the deeds, assignments and bills of sale from Oliver to Cunningham, the Buffalo agreement, and the deed from Cunningham to Robinson, Haines & Ranney, may be set aside as fraudulent and void.

2. That Hunt and Eschelman may be enjoined from selling the mortgaged property, under their decree of foreclosure.

3. That all the defendants may be enjoined from lumbering on the property.

4. That a receiver may be appointed.

5. That an accounting may be had.

6. For discovery.

7. That the assignment by Cunningham to Hunt

and Eschelman may be held fraudulent as to complainant.

8. That complainant may redeem.

9. That satisfaction of the mortgages may be ordered to be entered upon the record.

10. That the premises may be returned to complainant.

11, 12, 13 and 14. For other appropriate relief, process, &c.

This bill was filed on the 12th day of March, 1873.

All the defendants answered.

All answered severally except Hunt & Eschelman, who answer jointly and severally, after first pleading *res adjudicata*: (Their plea being overruled, with leave to include in their answer the matter attempted to be set up in their plea.)

On the 16th of February, 1875, Hunt & Eschelman filed their joint and several answer, of which the following is an abstract, (confining themselves to the defense of *res adjudicata.*)

They admit the execution of the purchase money mortgage, the seizing of Oliver in the land described in the mortgage. They ignore his title to the other lands, and the value of the lands and improvements, and deny that the pine lands were worth $160,000.

They say that on the 8th day of April, 1869, they filed their bill against David D. Oliver, Sarah Ann Oliver, George J. Robinson, Calvin Haines, Philip M. Ranney and Henry S. Cunningham, to foreclose the $35,000 mortgage; that decree was taken by confession, against all of the defendants, except Oliver and wife, who answered, and Oliver filed a cross-bill; that in both the answer and cross-bill, Oliver charged

substantially as in this suit, a conspiracy between these defendants, Cunningham, George J. and Henry Robinson, and Haines and Ranney, to defraud him out of the same property, described in the bill of complaint; that he there charged the assignment by Cunningham to his co-mortgagees, to be fraudulent, and that he made the transfers to Cunningham upon the same trust and without consideration; that Cunningham returned to Buffalo, and informed these defendants of what he had done, and that they, to get possession of his property, induced Oliver to consent to the sales to Robinson, Haines and Ranney.

That he also charged the same variance between the agreement which he assented to, and the one which was afterwards entered into. That he charged the organization of the firm of Robinson, Haines & Ranney, their entering upon the property, the subsequent entrance into the firm of Cunningham, the manufacture of lumber on the property, and that Cunningham represented Hunt & Eschelman, who through him were interested in the business, and charged in effect that Cunningham, Hunt & Eschelman were mortgagees in possession, and prayed for an accounting; that all the allegations of said cross bill, briefly stated in this answer, were substantially averred as set out in the complaint in this cause. That the foreclosure proceeding and cross-bill proceeded to a hearing on the 23rd of December, '72, and a final decree was entered, dismissing the cross-bill without prejudice, and ordering the property described in the mortgage to be sold to satisfy the amount due on the same, fixing the 24th day of June, 1873, as the limit of the time of payment for the said

mortgage, and that on the 28th day of August, 1873, the lands were sold. That because of the decree in said foreclosure suit and on said cross bill the complainant is barred from further prosecution of this suit.

Further answering, these defendants, Hunt & Eschelman, ignored the partnership between Oliver and Robinson, and the difficulties between them, and denied that they ever shared with Cunningham the possession and management and profits of said property, or that they had any interest in said property except through their mortgage.

They denied the proposition, Schedule "C." Denied all knowledge of the understanding between Oliver and Cunningham, as to the conveyance of the property, and denied that they ever authorized Cunningham to make any arrangement relative to the payment of their mortgage differing from its terms; denied that they formed a design to get Oliver's property, and that they met at Buffalo and took counsel and pretended to execute an assignment.

Denied that Cunningham assigned with an antedated instrument, with a false certificate of acknowledgment, and allege that Cunningham was at Buffalo on the 2nd day of September, 1868.

They ignored the transfers to Cunningham, alleged their understanding of the purpose of those sales, to be to enable him or Oliver to make a sale, and alleged that Oliver never claimed that he held them for any other purpose, and denied that Cunningham represented or acted for them.

They denied that Cunningham reported all that he had learned of Oliver's affairs.

They admitted that they knew of the Buffalo

agreement, but denied that they assented to it: and averred that said agreement was in writing and accorded with Oliver's verbal arrangement with Robinson, Haines and Ranney, the particulars of which were known to defendant. They denied that Robinson, Haines and Ranney, ever agreed to pay their mortgage, or that they ever agreed to look to them for it, and to release Oliver, or that there was any agreement binding them to delay the foreclosure of their mortgage.

Denied that any plan was formed for handling the property in fraud of Oliver, or by which Cunningham was to be interested in the property and operate it for their joint profit.

Denied that they ever had any interest in the partnership between themselves, or either of them and Cunningham, George J. or Henry M. Robinson, Haines and Ranney, or any of them. Denied that Cunningham represented them; denied that they and Cunningham, acting through Hunt, procured the Preston lands, or that they procured new machinery; denied that they have any interest in the Preston lands, or advanced money to Cunningham to purchase them, and denied any conspiracy.

Denied that they received or accepted an assignment of any obligation of Oliver, except such as were made in accordance with the terms of the Buffalo agreement.

Denied that they have received anything which ought to be applied on their mortgage, and ask that the bill be dismissed as to them.

The court below granted the complainant a decree for $41,000, the conveyance of lands, etc. Rec., p.

205. Interlocutory decree, p. 97. Modified, 102. Judge Withey's Opinion, p. 90.

Hunt and Eschelman alone appeal.

1. The admitted or undisputed facts are, that Oliver owned a large and valuable property, in the counties of Alcona, Alpena and Cheboygan, consisting of pine lands, a water mill, and the appurtenances surrounding it necessary for conducting the lumbering business; that in 1866 he gave to Cunningham, Hunt and Eschelman, a mortgage for $35,000, on about one third of these lands; that Cunningham was a lumber dealer in Buffalo without means, and Hunt was father-in-law of Cunningham, and was a wealthy farmer, living near Buffalo, and that Eschelman was also a farmer, a neighbor of Hunt, and that Hunt managed Eschelman's investments; that in the year after making the mortgage, Oliver built a steam mill, and formed a partnership with George J. Robinson, to whom he deeded a quarter interest in a part of the lands, and to whom he gave a quarter interest in the personal property accumulated around the mill; that during the same year, while making these improvements and carrying on the lumbering business, he became indebted to Haines & Ranney, to E. & G. R. Haines, and to Wayne and Robinson, and to secure these different debts he gave several mortgages upon portions of the entire tract.

It is also undisputed, that in the spring of 1868, Oliver and Robinson did not get along well as partners, and that Robinson virtually ousted Oliver from control in the partnership business.

It is also undisputed, that Oliver applied to the three first mortgagees, addressing a letter to Cunning-

ham and Hunt for aid, in his partnership difficulties, and that he outlined to them a plan which he desired to have carried out, and that a little later in the year, he visited both Hunt and Cunningham; and that as a result of that visit Cunningham went from Buffalo, N. Y., to Michigan, having first divested himself, in form, of his interest in the $35,000 mortgage, and that Oliver deeded to him, and transferred to him his entire property; that he returned to Buffalo and in about a month entered into an agreement to transfer all the property he had received to Robinson, Haines and Ranney; that about a month later he did make that transfer; that Robinson, Haines and Ranney, prepared for the next season's use of the mill and property, and in about a month's time Cunningham became a member, with them, of a partnership; and that said partnership continued to use and occupy the property until the bill was filed, and afterwards until the pine timber was all cut off and used up, and the mill was burnt up.

It is also undisputed that the transfer by Oliver to Cunningham, was without any money or other consideration whatever, but was made for trust purposes; that the transfer to Cunningham, to Robinson, Haines and Ranney, was without any consideration whatever, and that the property which the defendants obtained, and which they have converted into money, was obtained without any return whatsoever, to Oliver.

2. The first defense made by the appellants, is, that very soon after the property was transferred to Robinson, Haines & Ranney, and immediately after Cunningham became a member of the firm, they commenced to foreclose the $35,000 mortgage, and that

they made parties defendants to their foreclosure bill, all who are parties to this bill except Henry M. Robinson; that Oliver defended that foreclosure suit, both by answer and by cross-bill, and that he set up as a defence, and by way of cross-bill, the same state of facts, upon which he seeks to recover in this action, and that because he took that course in his defense and did not succeed in preventing the foreclosure of the mortgage, he is now barred from relief.

The dispute is narrowed to these questions:

First. Is the decree in the foreclosure suit, a bar to complainants' obtaining relief in this suit? The court below said no.

Second. If it is not a bar, were the two appellants interested as mortgagees in the transfer from Oliver to Cunningham, and with the other defendants in the conduct of affairs, after that transfer. The court below said yes.

Third. If they were interested, is Oliver entitled to equitable relief against them? The court below said yes.

FIRST PROPOSITION.

Is the former adjudication a bar?

The bill of foreclosure was brought for the purpose of obtaining the sale of 6,500 acres of land described in the mortgage, and this bill is brought to avoid deeds which conveyed 20,000 acres of land, and to avoid bills of sale and assignments, which conveyed much personal property. Consequently the subject matter in the two litigations is very different.

The foreclosure bill brought in as defendants, only those of the parties who had liens upon the land, described in the mortgage, and did not bring in Henry

M. Robinson, who held a mortgage called the Wayne mortgage, upon part of the 20,000 acres, but not upon any of the land described in the first mortgage. This bill makes him a party necessarily, because he was interested in the partnership which took possession of the land, and in the proceeds of the lumber and timber which was cut off from the land. Thus the parties in the two litigations are different.

When Judge Longyear rendered his opinion, ordering a foreclosure of the mortgage, and dismissing the cross-bill without prejudice, for the very purpose (as he stated) of enabling Oliver to seek relief by original bill, he clearly pointed out the reason why the facts which were set up by way of answer, and by way of cross bill, could not be utilized by the then defendant, at that stage. He said: (Page 1179), "Where, as in this case, the matter is presented by way of a defense to a foreclosure suit, and the conveyance of the equity redemption at the same time concerns property, parties, and matters entirely foreign to the matters involved in the foreclosure suit the mortgagor must be left to seek his remedy, if he have any, by a plenary suit." And, on the same page, the judge says further, that he has not expressed his opinion, whether Hunt and Eschelman were parties to or bound by the transactions or not, because a decision of that question of fact was unnecessary, and he did not desire to embarrass future proceedings.

Judge Withey, in deciding the case below, enunciated substantially the same doctrine, (page 95), and finds that the subject matter of this litigation is not such that Oliver was entitled to interpose it as a defense to a decree of foreclosure, and that H. M. Robin-

son, who was not a party to the foreclosure suit, was a necessary party to any suit in which the transactions in controversy were to be decided, and as he could not be made a party to the foreclosure, it was not Oliver's right to interpose the subject matter of this suit, as a defense to that.

The first objection, manifestly, must be decided adversely to the appellants.

Freeman on Judgments, Sec. 270 of "Dismissal of bill in equity."
Durant vs. Essex Co., 7 Wall., 207.
County of Mobile vs. Kimball, 102 U. S. 705.

SECOND PROPOSITION.

The two appellants were interested as mortgagees in the transfer from Oliver to Cunningham, and with the other defendants in the conduct of affairs, after the transfer from Oliver to Cunningham.

The whole series of events from the time Oliver applied on the 9th of June, 1868, to Hunt and Cunningham, who was Hunt's son-in-law, down to and after the commencement of this suit, was the result of a deep laid plan, to get possession of this property, organized and inaugurated by Hunt, Cunningham & Eschelman, and carried out by them, with the assistance of the other defendants, some of whom they were compelled to admit to a share in the undertaking. And so the court below held.

The court is called upon to determine the truth of this proposition, and we call attention to the testimony.

1. On June 9th, 1868, Oliver wrote a letter, which is found at page 23, Exhibit "C," to Hunt and Cun-

ningham; he said: "I am in great need of your assistance, in my matters up here. And first, I will give you a brief statement, of things here, and then I will tell you what I wish you to do for me."

He followed this with a statement of his assets and liabilities, of his relations with Robinson, and stated that he wanted to quit-claim to them his property, and added a plan of the course he wanted them to pursue.

This letter was taken by George W. Hawkins, and delivered to Cunningham, (p. 1302.) At the same time that Hawkins, as Oliver's agent, delivered this letter, he acting for Robinsons, and without the knowledge of Oliver, saw all the mortgagees, (p. 1302.) "I saw Calvin Haines and Ranney at Lockport, and I went over and saw Hunt, and from there to Buffalo, and saw Cunningham, and E. and G. R. Haines, at Buffalo. His mission from the Robinsons, was to urge a foreclosure of the mortgages. (p. 1302.)

Almost immediately the Haines and Ranney went to Ossineke, and held consultations with Robinson. (p. 1303.) Then the Haineses returned to New York, and consulted with Hunt. (p. 1303.)

Then a contract between Haines and Oliver, was entered into, which is found on Exhibit "R," on page 1628, by which Oliver agreed to pay E. and G. R. Haines, and C. Haines & Company, together, $27,500, by the 5th day of the following September, or if he did not, gave them the option to buy his interest in the partnership, and his interest in the lands in towns 28 and 29, upon their agreeing to pay the other mortgages, and the amount due Preston, and $10,000 in addition. He also agreed to deed some other lands at $10 per acre.

This agreement never was carried out, and is important only as it gives color to Oliver's version of what he understood was to be done later between Cunningham and the parties to whom he transferred title.

Oliver continued to urge Cunningham and Hunt to assist him. He urged that the Robinsons ignored him in the partnership. (Cunningham's testimony, p. 300.) He gave to Cunningham a full history of his affairs. (Cunningham's testimony. p. 301.) And finally Cunningham agreed to go to Ossineke, but before going, he called Hunt and Eschelman to Buffalo, and there, after a consultation with their attorney, Williams, without the knowledge of Oliver, Cunningham asigned to Hunt and Eschelman his one-third interest in the $35.000 mortgage. (Cunningham's testimony, p. 278.) Neither Hunt nor Eschelman paid for his interest then assigned, anything, either at that time or ever afterwards. (Cunningham's testimony, p. 290. Cunningham's testimony, p. 277. Hunt's testimony, p. 600.) (Eschelman says at this time he did pay $2000, either the day of the assignment or the day after; that he paid it in currency, from money that he had on his person, but he is contradicted by Cunningham, who says he did not pay, and not only that, but Cunningham was obliged to borrow money from Tanner to pay his expenses to Ossineke, whither he departed that very afternoon.) (Cunningham's testimony, p. 562.)

This assignment was made under the advice of an attorney, (Williams' testimony, p. 1500,) and these defendants can give no reason why it was made different from that which Cunningham, in October, gave to Oliver as the reason, namely, that it should be out of

the way in case of a "rip up." (Oliver's testimony, page 351.)

The assignment made, Cunningham borrowed $50 from Tanner, with which to pay his expenses to Ossineke, went to Ossineke, and keeping Oliver profoundly ignorant of the transfer of the mortgage, and particularly telling him that Hunt and Eschelman were backing him in what he was doing, took the transfers, which stripped Oliver of all his property. (Oliver's testimony, page 353.) Exhibits D, E, F, G, found on pages 27 and 29.

Oliver had no knowledge of this assignment, until in October, after the Buffalo agreement had been made, (Oliver's testimony, p. 390,) when it was too late for him to protect himself.

After Oliver had deeded to Cunningham, while Cunningham was still at Ossineke, Oliver asked him to execute a defeasance or trust paper, or something to protect Oliver in the transaction, but this he refused to do, stating that Oliver must trust him all in all or not at all. (Cunningham's testimony, page 288.) Q. "Did you explicitly decline to have any writing between you and Oliver touching this matter of the transfer of his property to you?" A. "Yes, sir; I told him I should not give anything; that I was only doing it gratuitously, at Oliver's request and solicitation. He was in a bad fix, and if he was not satisfied with that, to take it right back, right there; that I was not going to do anything to complicate matters or get myself in a fix."

Matters were now ready for the second step. Oliver was out of the way, but something must be done with the property. Within a few days, Cunningham,

Ranney and Robinson, met in Mr. Duffield's office, in Detroit, and began to make definite arrangements to handle the property.

What took place at this interview, is testified to by Robinson, and is denied by both Cunningham and Ranney.

Cunningham says that he met Robinson and Ranney at Duffield's office on the 20th of August, a month previous. (Page 512.) Ranney says that there was a meeting at Duffield's office, which he fixes as in the spring of 1863. (Ranney, page 611.) Robinson fixes the time, as just previous to his letter of September 28th, 1868, found on page 1586, in which he said:

"I am going to Buffalo in a few days, and have assurances that a new and powerful company will be organized. I have seen Ranney and Cunninghan, and it looks like a dead shot."

Robinson testiffes on page 402, that he met Ranney in Detroit, who told him that Cunningham was then at Duffield's office, and wanted to see him; that he thought that some arrangement might be made by which all the parties interested in that property could get together and make an arrangement, for the handling or selling of the property, so as to harmonize all the interests.

"I called on Mr. Cunningham along with Mr. Ranney, and found that Cunningham was considerably agitated, with reference to finding that his mortgage did not cover the mill site and its improvements." "He wanted us to meet him and the other parties interested, in Buffalo, to see whether our interests could not be harmonized, and something done in the matter; he wanted Haines, Ranney and myself to meet him, Hunt and Eschelman in Buffalo. * * The next talk was in Buffalo, with all these parties,

Calvin, Haines, Philip M. Ranney, Henry S. Cunningham, Garrett B. Hunt, and Jacob Eschelman. * * We commenced to negotiate with Oliver. * * * I then went and saw Mr. Hunt, and talked the matter up with him, and from him I first learned what were the real plans in buying the property. Mr. Hunt told me that they were ready to take hold and buy the property with us, but at that time they did not know what the legal effect might be of this transfer, that had been made by Oliver and Cunningham, and wanted C. Haines & Company and myself, to go on and make the purchase, and that they would themselves, furnish somebody to take an interest in the concern, and put in that mortgage to pay for it."

This testimony of Robinson is all denied point blank, but it is supported by the fact, that beyond all question, the parties were all together in Buffalo, negotiating concerning the property, and that those negotiations culminated in the Buffalo contract, found as Exhibit "H," on page 30, by which Cunningham transferred all the property without consideration, to Robinson, Haines & Ranney, and by the fact that the defendants actually carried out about what Robinson says that they told him was the plan.

This contract was dated on the 3rd day of October, 1868. On the third day of November, 1868, Haines and Ranney, and Robinson, made the very remarkable agreement found as Exhibit "Z," on page 1106.

At the hearing below, the counsel, without any evidence to support him, claimed that this agreement was a forgery, and in this court we apprehend that he may make a similar claim, inasmuch as the paper does not in itself bear the appearance of a very formal contract.

Robinson produced it, testifies to its drafting and execution, and Ranney, testifies that he also remembers signing it. (Ranney, page 609.) It corroborates the testimony of Robinson, inasmuch as it shows that as early as the third day of November, it was contemplated that just such a partnership should be formed, as was in fact, afterwards formed, and it adds great weight to the statement of Robinson, that the first idea of harmonizing all the interests was brooched about the middle of September in Mr. Duffield's office.

One very significant indication of the conspiracy is shown by the dealing with Oliver with respect to the paper which is called the Buffalo agreement, (Exhibit "H," on page 30.) The parties were talking with Oliver, and were ostensibly and apparently about to deal in a perfectly open and honorable manner in regard to the property which Cunningham had just received from him, and they made a verbal agreement with Oliver, or a verbal statement to him as to what they proposed to do, and got his assent to the proposition.

We have another question about which there is dispute; Oliver testifying that the proposal as disclosed to him differed materially from the proposal which was finally included in the Buffalo agreement, and which was kept concealed from him; while the other parties, except Robinson, state that Oliver was fully informed of the contents of the Buffalo agreement, at the time it was drawn. A careful analysis of the testimony even of the defendants, will show that they are wrong as to this fact.

First. Oliver says on pages 387, and 388, that his understanding of the dealings was that the property

was to be handled substantially in accordance with an agreement he had previously made with the Haines, substantially as follows:

"I was to have thirty days to sell the land in, and at the end of thirty days, if I did not sell the property, they, the buyers, were to pay, or to secure to be paid, and cancel and deliver up the Hunt, Cunningham and Eschelman mortgage; the mortgage to James B. Wayne, and the mortgage to E. Haines & Company, and their claims which contained a contract, which I made in February, 1868, and half of the E. & G. R. Haines mortgage, and to pay James H. Hill, of Saginaw, his claim of about $3000, and to release and discharge George W. Hawkins from all liabilities, growing out of the business with me, and to pay all of the claims of the firm of Oliver and Robinson, and upon their doing this, then Cunningham would be permitted to deed to Robinson, Haines & Ranney, all the lands deeded to him by me and David Preston, in towns 28 and 29, of range 8, east, and he was to deed back to me, all the lands outside of those towns."

A comparison of this understanding, with the contract actually made, shows how different was the agreement from what Oliver assented to.

A. By the agreement, the purchasers were not to pay the Hunt mortgage, the Wayne mortgage, the Haines mortgage, or the Haines claims, or half the E. & G. R. Haines, mortgage, or the Hill claim, or the claims against the firm of Oliver and Robinson, but took the property simply subject to those claims, and only agreed to pay the half of the mortgage held by E. & G. R. Haines; or in lieu of paying the half of the E. & G. R. Haines mortgage, they might, if they chose, pay the mortgage given by Hawkins.

Oliver was right in his statement of what was dis-

closed to him, as to the agreement that was proposed to be entered into. We base this statement on the following testimony:

First. Exhibit "N," which was a paper written on the 2nd day of October, by Oliver, delivered to Cunningham, and afterwards produced by Cunningham. This recites that the intending purchasers had contracted with Cunningham to buy the land and *assume* certain indebtedness of Oliver's, and of the firm of Oliver & Robinson.

Second. Cunningham says that the land was offered to Wheeler & Weston, upon the same terms that it was offered to Robinson, Haines and Ranney. (Cunningham, page) Hunt said the same, but Wheeler & Weston, both say that the terms of the sale to them, were, that they were to pay all the claims. (Wheeler, page 466.) (Weston, page 496.) Nor were they to have the personal property, which Cunningham conveyed to Robinson, Haines and Ranney, and which amounted to at this time, according to the master's finding in the court below, to $57,066.67, of which Oliver was entitled to three-fourths, and which would have been clear to him in case he had found a purchaser, who would take the land, and pay the debts of himself and his firm.

Third. Williams, the draughtsman, who drew the Buffalo agreement, says that he prepared a first draft, but there were so many interlineations and changes, and erasures, that a second draft had to be prepared.

A few erasures and interlineations would change the agreement as stated by Oliver into the agreement as finally executed by the defendant.

Fourth. The agreement was finally executed, after Oliver had gone away, in his search for purchasers, others than the defendants, and the agreement was left with Williams, and Oliver not permitted to see it, until long afterwards, not until after the thirty days limit had expired. (Cunningham's testimony, page 567.)

The standing of the parties at this time was this:

1. Oliver had nothing; he had parted with all his property and got nothing in return.

2. Cunningham had nothing; he had assigned his interest in the mortgage, and his interest in the trust property, and had received nothing for either.

3. Haines & Company, and Robinson, had the legal title to the property, and had parted with no value for it, and had assumed no obligation in taking it.

4. Hunt and Eschelman held the first mortgage; the mortgage of Haines and Ranney against Oliver, which they had acquired on the 2nd of October, 1868, the day before the Buffalo agreement, (Exhibit "U," page 3559.) (The Buffalo agreement falsely stated that this mortgage belonged or had been assigned to W. H. Helmaer.)

Hunt and Eschelman also on the 13th of November, before the Buffalo agreement was consummated, acquired the mortgage of E. & G. R. Haines, for which Hunt and Eschelman gave their note for $6,000, which was afterwards paid by Cunningham, Robinson, Haines and Ranney.

5. H. M. Robinson held the Wayne mortgage.

To make the scheme successful, it was necessary to operate the mills, and for that purpose the partnership was organized.

Cunningham had hinted at a possible partnership; Hunt had stated to Robinson the plans that were being followed out; Eschelman had specifically entrusted his business to Cunningham and Hunt, or at least told Robinson that he had done so, and on the 3rd day of November, Haines, Ranney and Robinson, preparatory to receiving title to the real estate from Cunningham, had made and signed a memorandum of agreement, reciting their agreement to purchase the lands; that they were to form a new partnership agreement thereafter, with contemplated partners, in such a manner as to fund the principal liabilities of the parties, and that in such partnership C. Haines and Company were to be credited $19,000 for their claim of $19,000. George J. Robinson was to be credited $25,000, and should Hunt and Eschelman become the contemplated partners, they were to be credited $35,000, and interest *i. e.* their mortgage. Of these amounts, $20,000 to $25,000, was to be considered a stock contribution, and any party putting in more than that amount was to be allowed interest on the surplus, and Robinson was to dispose of his mortgage made to Oliver to suit himself. (Exhibit "Z," page, 1105; Robinson, page 405).

This was the written partnership agreement, under which the new firm began to work, under the firm name of Robinson, Haines and Company, and under which it continued business, until the 7th day of the following January.

It is very significant that in making this contract, on November 3rd, Haines and Ranney were dealing with a mortgage which they had assigned to Hunt and Eschelman, more than a month before. It is also significant that the $19,000 to be credited to them was

an amount equal to their own claim, then in the hands of Hunt and Eschelman, and that of E. & G. R. Haines, which ten days later, was assigned to Hunt and Eschelman, for $6,000.

Under the name of Robinson, Haines and Company, the new firm began putting in supplies, for a winter's work, and almost immediately, Cunningham appeared as an active adviser, in the management of affairs. On October 26th, 1868, he wrote to Robinson asking him to investigate at Buffalo, with reference to purchasing supplies, (Exhibit "W," page 1102.) This was before the transfer of the property, in pursuance of the Buffalo agreement, had been made. The transfer was consummated on November 13th. A month and a half later, on the 1st day of January, Cunningham wrote to Robinson, a letter found on page 1101, Exhibit "V," which shows that prior to that time, all the details of the partnership had been fixed upon, and shows that those details had been fixed upon before the 19th of December. There is no talk in it about forming a partnership, but there is talk about purchasing expensive machinery for the mill, machinery which finally cost about $11,000, and a statement that provision had been made for raising funds, which the letter of January 27th shows to be for $16.000, and there is a statement of the employment of help, which shows that the partnership of Cunningham, Robinson, Haines & Ranney was no longer in a formative stage, but was a consummated fact. It shows too, that there was some hesitation about their putting so much money into the machinery. They were going to see Wayne, the machinist, about buying a gang, but before they bought a

gang, they were going to see an attorney about something.

Reading the letter in the light of the facts that we now know, there is no difficulty in understanding what they were in doubt about.

On the 7th of January, there met in the office of Duffield, at Detroit, the parties who signed the partnership articles, under which the new firm ostensibly commenced business. These parties were Garrett B. Hunt, H. M. Robinson, and Calvin Haines. They came according to the programme laid down in the letter of January 1st. They were going to buy a gang; they were going to consult with Mr. Duffield about something, the subject of which was well understood, because it is referred to in the letter of January 1st, so indefinitely that no one who had not known the subject by previous conversation or correspondence would know anything about it.

They did buy a gang which Hunt paid for, and which went into the mill, then nomially owned by Robinson, Haines and Ranney. They did meet at Mr. Duffield's office, and undoubtedly held a consultation with Mr. Duffield. At any rate he prepared and they signed articles of partnership. To these articles, H. M. Robinson signed George Robinson's name. Haines signed the name of C. Haines & Company. Hunt signed the name of H. S. Cunningham.

Hunt said he didn't know the contents of the paper he was signing, or what constituted the capital he was putting in, but his statement is absolutely incredible in view of the fact that he came here to Detroit with no other errand than to buy that gang, and to consult with Mr. Duffield, and in connection with

the agreement of November 3rd, it is perfectly apparent that this agreement of January 7th, Exhibit "Y," page 1104, was a funding of the liabilities against the property.

It must be borne in mind that at this time, Hunt and Eschelman held the $35,000 mortgage, which in reality belonged to themselves jointly with Cunningham, Hnnt's son-in-law. They also held the Haines mortgages, which had been nominally transferred to them, but actually belonged one of them, to C. Haines & Company, and the other to all the contracting parties, and H. M. Robinson held the Wayne mortgage, and held some chattel mortgages upon the personal property, which had been given him by George, without consideration, and these constituted all the claims outstanding against Oliver, except the Hill mortgage of $3000.

Observe that in the formation of this partnership, no one of the parties put in or claimed to have put in, any money. They, none of them, desired to testify about the formation of the partnership, and it was only by a most persistent and labored cross-examination, that any of them could be induced to say anything about the matter. The documents show pretty conclusively what the capital of the firm did consist in, and the persistent refusal of all the defendants to make any explanation, renders it conclusive that the natural inference to be drawn from the documents, is the true one, namely: that the capital of the firm consisted of the land, of which the legal titles belonged to Robinson, and Robinson, Haines and Ranney, and the firm was formed by the finding of claims against the land.

To this partnership Cunningham contributed the claim evidenced by the mortgage belonging to himself, Hunt and Eschelman. Robinson contributed the claim evidenced by the Wayne mortgage. C. Haines & Company contributed their own and Haines' brother's mortgage.

The firm assumed all the debts of Oliver and Robinson, and took all the personal property. It assumed a debt which Hunt and Eschelman had incurred by buying the Preston lands, on the 10th November, 1868, (Schedule "B," p. 21,) (Exhibit "Y," 4th paragraph, p. 1104,) and a debt which Hunt and Eschelman had incurred in buying the E. & G. R. Haines mortgage.

In spite of the denial which both Hunt and Eschelman make of all knowledge of the formation of a new partnership, we find that they were actually engaged in promoting its interests, and in taking steps, even long before it was actually formed, to bring it about.

On the 2nd of February, 1869, in his letter of that date to George Robinson, (Exhibit "U," page 1100,) Cunningham expressed very clearly the relation between himself and Hunt and Eschelman, when he says, "Mr. Eschelman is a very quiet and comfortable partner, and I should like to have him feel that he is properly recognized in the concern, &c."

Almost immediately after the partnership was formed, a bill was filed in the name of Hunt and Eschelman to foreclose the $35,000 mortgage, filed on the 8th day of April, 1869. The resulting litigation lasted until the 23rd day of December, 1872, and resulted in a decree for a sale, which was carried out on the 28th

day of August, 1873, when George Robinson appeared at the place of sale and bid in the property in the name or Garret B. Hunt, for the precise amount that had been found to be due on the mortgage.

This formal sale did not change in any respect the relation of the parties. The firm that had been on those lands, engaged in lumbering them, continued there without molestation. Two years later, in 1875, through the instrumentality of Robinson and Cunningham, they made a sale of what was left of the standing pine to Messrs. Merrick, Fowler & Lyon, for $46,000, and the proceeds arising from the sale were applied in payment of the debts of the new firm, especially in payment of those debts which Hunt had endorsed for. (Hunt's testimony, page 598 and 599.)

When the mortgage was foreclosed, the expenses, which amounted to a large sum, were paid by the firm.

Again, it was provided for in the Buffalo agreement, that if the purchase of the land should pay G. B. Hunt, within one year from the 3rd of November, 1868, the sum of $4000, they should not be held to assume the E. & G. R. Haines mortgage, nor to discharge the Hawkins mortgage. At this time the E. & G. R. Haines mortgage had been assigned to Hunt and Eschelman, though no mention of the assignment is made. The fact explains the reason for the clause, which would otherwise be unexplained.

Now we note what followed. On the third of Noveber, 1869, Ranney sent to Oliver a letter, notifying him that this sum had been paid, (Exhibit "G," page 1614.) On the following day, Garrett B. Hunt, writing from East Clarence, near Buffalo, N. Y., notified Oliver that he had received the $4000, and on the

7th day of November, writing from Buffalo, N. Y., he repeated the notification. (Exhibits "R," and "S," page 1615.) This was not an actual payment of money, but was a check drawn by Robinson, C. Haines & Company, a firm that was not then in existence, in favor of Garrett B. Hunt, and was never used; that is, the whole arrangement between the defendants, was a contrived plan to get from Oliver something that would amount to a ratification of the Buffalo agreement.

This transaction shows over Hunt's own signature that he was acting with the other defendants.

We recapitulate in brief form some of the salient facts which show the unity of interest of Hunt and Eschelman in the new firm.

THE UNITY OF INTEREST OF HUNT AND ESCHELMAN WITH THE NEW PARTNERSHIP.

1. They and Cunningham were jointly owners of the capital stock in Cunningham's name.

a. The three had originally owned the mortgage together.

b. Hunt and Eschelman became nominal owners, just before Cunningham went to Ossineke in September, 1868, in order that the future operations of Cunningham might not be hampered by reason of his being a mortgagee.

Williams' Testimony, p. 1500.
Oliver's " p. 351.

And was made to be held for a time and returned.

Hunt's Testimony, 601.

c. Cunningham never received any money from either Hunt or Eschelman for the assignment.

Eschelman thinks he did pay $2000, but the time and place he fixes for such payment show he is mistaken, and he is directly contradicted by Cunningham himself.

Eschelman's Testimony, p. 531.

2. This mortgage, without any re-assignment, was used by Cunningham as his portion of the capital of the new firm.

Robinson, p. 496.
Eschelman, pp. 536-542.
Ex. "Z," Ex. "Y."
Haines, 496.

a. Eschelman recognized Cunningham as representing his interest in the firm, and relied on him to take care of his interest.

Eschelman, pp. 545-546-547.
Cunningham's Letters of Jan'y 1, and 27.

b. Hunt signed the partnership agreement by which the mortgage became a part of the capital of the new firm.

Hunt's testimony, pp. 586-587.

3. In the middle of December, 1868, Cunningham, H. M. Robinson, Haines and Ranney, Hunt and Eschelman, met at Lockport, and provided funds for the season's work, and just before the 27th January, the same parties, except Robinson, met at Tonawanda, to consult about the matter, and about building docks, etc., at Ossineke.

Eschelman, p. 543.
Cunningham's Letter, 27 January.

4. On the 7th January, 1869, Hunt came, in pursuance of agreement made at Lockport, to Detroit, for

the purpose of purchasing machinery for the new company.

January 1 Letter.
Hunt's tes., 587.

5. At one of the meetings, Geo. J. Robinson's request for a book-keeper, was discussed, and Eschelman suggested his son, and Cunningham was desirous of having Mr. E's wishes gratified, because M. E. was a "very quiet sort of partner, and I would like to have him feel that he is properly recognized in the concern, when it can be done without working injury to the other parties."

Eschelman's Testimony, p. 545.
Letter of Feb. 2, '69.

6. The mortgage was foreclosed, the expenses paid by the *firm*; the land bought at the sale under G. J. Robinson's directions, in the name of Hunt, and the firm still continued to occupy the lands and lumber on them.

It is to be noticed that this purchase was an empty formal proceeding, the property was put up at auction under the order of the circuit court, and bid in for the amount due; there was no deficiency and no surplus.

Master's Report, not printed.
Order confirming Report, 1185.

7. The Preston lands, which were not covered by this mortgage, were bought with monies, primarily advanced by Hunt and Eschelman, and subsequently repaid to them from monies accruing to the partnership from their general business.

See 7th January Agreement.

8. Hunt and Eschelman endorsed largely the paper of the firm, and Hunt says he reimbursed himself for many of such endorsements that he had paid, with the moneys arising from the last sale to E. M. Fowler & Co., of the timber on the mortgaged lands.

9. Cunningham and Haines, both show by their letters to Robinson, their constant consultation with Hunt, and his active interference in the affairs of the company.

See Haines' Letter to H. M. Robinson, Ex. "A," 26.

10. One of the provisions of the Buffalo agreement was, that the purchasers of the land should pay to G. B. Hunt, within a year from the 3rd of November, 1868, the sum of $4,000. On the third of November, 1869, Ranney sent to Oliver a letter, notifying him of the payment of this sum. Hunt on the next day sent two notices of its receipt to Oliver, one from Buffalo, and one from Clarence.

This check was signed by Cunningham, Robinson, Haines & Co., was credited to the Buffalo branch and charged to the Ossineke branch of the firm, was sent to Hunt and *never used.*

Ex's "O, R, 3," p. 21, Old Record.
Ranney, p. 246.
Hunt, 212.

But the most significant of all, is the fact, that from the very beginning Hunt and Eschelman stood ready to receive and did receive title to all such papers as it might be inconvenient for the open members of the firm to take.

Thus, on September 2, they took Cunningham's title to the large mortgage, and they did not pay for it.

Thus, on Oct. 2, they took an assignment from Haines & Ranney.

Thus, on Nov. 13, they took an assignment of the E. & G. R. Haines mortgage.

Undoubtedly, Oliver deeded to Cunningham, supposing him to be mortgagee; and undoubtedly Cunningham's relation of mortgagee never changed; his nominal transfer to Hunt and Eschelman was an empty formality.

None of the defendants below could be considered as innocent purchasers for value, for none of them have ever given any value for the property. They took the property to make the most possible out of it fraudulently.

All the defendants below may be considered mortgagees, for each one of them derives his sole interest in the real estate by virtue of some mortgage interest against the property—thus, Cunningham contributed the Cunningham, Hunt and Eschelman mortgage, Haines and Ranney contributed their mortgage, Robinson contributed the Wayne mortgage and the lien he had under his original partnership articles.

The mortgagees, Cunningham, Hunt and Eschelman, obtained the control of the property, and they and their agents, the persons to whom they delivered control without value received, have been stripping the property of its timber and absorbing the proceeds arising from all the property.

The relative rights and duties of mortgagor and mortgagee are considered in

Peugh vs. Davis, 96 U. S., 332, and cases cited.
Emerson vs. Atwater, 7 Mich., 12.

The liability of the mortgagee for rents and profits is asserted in the same cases.

From the foregoing it appears—

1. That Oliver was owner of the fee and mortgagor.

2. That he dealt with Cunningham as first mortgagee.

3. That he deeded to Cunningham for the specific purpose of turning the property into money, either by a sale of all the property together or by a sale of the timber in the usual course of business; both plans were considered.

4. That Cunningham abused the trust imposed upon and accepted by him.

5. That the defendants conspired together to obtain the property.

6. That they deceived Oliver relative to the contents of the Buffalo agreement, and that the appellants and all the defendants below participated in such deception.

It legally follows that the appellants and their associates stand in the position of mortgagees who have obtained possession of the property and a conveyance of the equity of redemption, not only without value but by means of a fraudulent conspiracy.

By their own course of action the appellants and their associates have placed it beyond their power to return the property uninjured. A large portion they have converted into money. Of this we are able to determine the value and are entitled to recover it.

Cunningham was Oliver's agent to deal with the property. The appellants and other defendants below knew of the agency and conspired with him to obtain

possession of it without giving value. They are liable for the value of the land.

Moore vs. Mandelbaum, 8 Mich., 433.
Oliver vs. Piatt, 3 How., 333.
Seymour vs. Freer, 8 How., 214.

Cunningham no where claims that Oliver was deeding him his equity of redemption for any other purpose than to have the property converted into money for Oliver's benefit. It follows that Cunningham, together with the appellants and other confederates, were Oliver's trustees of the proceeds arising from the sale of the premises.

Oliver knew Cunningham as mortgagee, and the deliberate nominal transfer by Cunningham of his mortgage interest, preparatory to acting upon Oliver's proposition, and his concealment of his transfer from Oliver, and refusal to give a defeasance, are conclusive evidence of a fraudulent purpose, which in equity avoid the deed and place the lands in his hands subject to a trust in favor of plaintiff by operation of law,

Moore vs. Mandelbaum, above, 444, and cases cited.

and if so, the property which he took from it and converted to his own use, must also have belonged to Oliver.

The active interference of all the defendants, and their active participation in subsequent transactions to successfully consummate the fraud, render them equally liable with Cunningham. Especially is this the case with Hunt and Eschelman, the appellants, who were aiding in the fraud from its first inception.

Cunningham was bound to account for the proceeds of the sale of the lands put in his hands to sell by Oliver—but he and the appellants and other de-

fendants so arranged that there should be no proceeds, or rather that the proceeds should come to them from sales to other parties. They are bound to account.

See Sheldon vs. Estate of Rice, 30 Mich., 296.

If this court is satisfied, as the court below was, that at the time Cunningham took the deeds from Oliver, in September, 1868, he had formed the design of obtaining the title for his own benefit, or for the benefit of himself, and his co-mortgagees, and that the assignment of his interest in the mortgage was made and concealed from Oliver, for the purpose of furthering such design, then the entire transaction was void, and Oliver still remained the owner of the property.

Moore vs. Mandlebaum, supra.
Bollman v. Loomis, 41 Conn., 510, cases cited.

If a confederacy then existed between him and his father-in law, Hunt, and Eschelman, the appellants, of which confederacy Cunningham was the active man, and in which he was afterwards joined by the other defendants below, and if the sale from Cunningham to Robinson, Haines and Ranney, lien creditors of Oliver and confederates, was in pursuance of this design, then none of the defendants can take any title from such sale.

Jackson v. Ludeling, 21 Wallace, 616, 632, middle.
People v. Tsp. of Overyssel, 11 Mich., 222.
Flint & P. M. R. R. v. Dewey, 14 Mich., 477.

The appellants can get no better title to the property than Cunningham, who paid nothing, had; they only gave him for the property a partnership interest in the new partnership, and are limited to his rights. They not only had notice but were original confederates.

Hoffman v. Cumberland Coal Co., 16 Md., 456.
Beal v. Chase, et al., 31 Mich., 531.
Conway v. Alexander, 7 Cranch, 288.
Spregg v. Bank, 14 Pet., 201.
Morris v. Nixon, 1 How., 126.
Russell v. Southard, 12 Id., 139.
Babcock v. Wyman, 19 " 289.
S. C., 2 Court., C. C., 398.
Villa v. Rodriquez, 12 Wall., 333.
Peugh v. Davis, 96 U. S., 332.
S. C., 113 Id., 542.
Brick v. Brick., 98 U. S., 514.
Emerson v. Atwater, 7 Mich., 13.

In the last case referred to, the facts are very similar to the case at bar, and the relief granted essentially the same as that granted by the court below in behalf of Oliver, complainant and appellee.

Our second proposition then, must be answered as the court below answered it, viz: that the two appellants were interested as partners with the other defendants, in the absorption of Oliver's property.

Third proposition.

Oliver is entitled to the equitable relief against the appellants which the court below granted.

This flows from the second proposition, and only the propriety of the decree as to value is to be considered further.

The value of the property.

The values of the property have been examined with great care by the master in the court below. The values adopted in the final determination, are in many instances much below what they should have been, and some of the charges made against the complainant, were in excess of what they should have been, but the complainant has not appealed, and of course, cannot

seek to have the decree below enlarged in his favor. There is nothing anywhere which will warrant a diminution, and we therefore say, that we are entitled to an affirmance of the decree below, as against appellants, in respect to the amount of their liability.

During the pendency of the appeal, the property has remained in the possession of the defendants. We sought to get possession of in on a writ of restitution, which was granted by the court below, and recalled by this court. (*Hunt* v. *Oliver*, 109 U. S., 177.) And because we have not had the possession, the decree below, with its interest, should be increased by a proper amount, to compensate us for our loss of the use of the property, from the 11th day of June, 1880, down to the present time. The master below fixed this use at $375 per year. This, with interest on the deferred payment, would amount to about $2725; and we think this should be added to the money decree, and the interest thereon, as found by the court below.

This litigation has lasted from 1869, till now. It found the appellee in active middle age. It will leave him an old man, but cheered by the fruits of the tardy justice which an affirmance will give him.

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